QUARTERLY REPORT

OF THE

ATTORNEY GENERAL

OF

ALABAMA

For the Period

October 1, 1949

Through December 31, 1949

Volume No. 57

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from October 1, 1949, through December 31, 1949.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL

Published by
WALKER PRINTING COMPANY
Printers and Stationers
Montgomery, Ala.

OPINIONS

October 3, 1949.

Hon. Charles E. Sellers,
Tax Collector,
Houston County,
Dothan, Alabama.

Tax Assessor and Tax Collector—Houston County.

1. The Tax Collector of Houston County under the provisions of Act No. 12, Local Acts 1945, page 10, does not pay any fees directly to the Tax Assessor of such county.

2. The Tax Assessor's compensation is paid exclusively and wholly from the general fund of Houston County.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 16, 1949, is as follows:

"As the incoming Tax Collector of Houston County I want to get your opinion as to disbursement of funds that I collect.

"Heretofore the collector has been on a fee basis but now will be on a salary basis.

"Shall I pay the Assessor his fees direct to him or shall all funds go into the County treasury and they in turn pay him."

In answer to your request, your attention is directed to Section 1 of Act No. 12, H. B. 218, Local Acts 1945, page 10, which provides as follows:

"Section 1. That the salary or compensation of the Tax Assessor of Houston County, Alabama, shall be Four Thousand ($4,000.00) Dollars per year, and the said Four Thousand ($4,000.00) dollars annual salary or compensation shall be paid out of the county treasury of Houston County, in equal monthly installments, at the end of each month, upon warrants drawn in the same manner as employees of Houston County are paid."

This Act in no uncertain terms provides that the salary of the Tax Assessor of Houston County shall be paid out of the county treasury of Houston County on equal monthly installments at the end of each month, upon warrants drawn in the same manner as other employees of Houston County are paid.

It, therefore, necessarily follows that all monies collected by you are to be paid into the general fund of Houston County and you are not to pay any fees whatsoever to the Tax Assessor of your county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 3, 1949.

Hon. Otis R. Burton, Tax Collector,
Hon. T. N. Washam, Tax Assessor,
Talladega County,
Talladega, Alabama.

Tax Assessors—Tax Collectors—Talladega County.

The Commissioners Court of Talladega County under the provisions of Act No. 206, S. 285, Local Acts 1945, page 114, may by proper resolution pay the necessary expenses of the tax assessor and tax collector in maintaining offices for the purpose of collecting and assessing taxes in the City of Sylacauga.

Opinion by Assistant Attorney General McQueen.

Gentlemen:

Your request for an official opinion, bearing date of March 23, 1949, is as follows:

"On June 23, 1945, a Local Act was adopted by the Legislature, shown in Local Acts of 1945 at page 114, requiring the Probate Judge, Tax Collector and Tax Assessor of Talladega County, Alabama, to maintain sufficient clerical force in the City of Sylacauga for the purpose of collecting business licenses, automobile licenses or other licenses and requiring the appropriation of such amount from the General Fund of the County as may be necessary to defray the expense of such service.

"Will you not please advise us whether or not, under the provisions of such Act, we should be reimbursed by the Commissioners Court of Talladega County for the travel expense of ourselves and clerks, meals for ourselves and clerks, rental of office space and clerk hire, and the expense of the hire of clerks who would not be needed if such Act had not been enacted. In other words, the above expenses are expenses to which we would not be put in making the ordinary rounds required by law were it not for the Local Act referred to."

My answer to your inquiry is in the affirmative.

Section 1 of Act No. 206, S. 285, Local Acts 1945, page 114, reads as follows:

> "Section 1. The Commissioners Court of Talladega County shall, by resolution, spread upon its minutes, prescribe dates between the first of October and the 15th day of November of each year when the Probate Judge, Tax Collector and Tax Assessor shall maintain sufficient clerical force in City of Sylacauga for the purpose of collecting any business license, automobile license or other license due or thereafter due, and assessing and paying any real or personal property tax or other tax that may then or thereafter be due; the above resolution shall also state and provide for the place where said clerks shall be stationed and shall appropriate such amount from the general fund of the county as may be necessary to defray the expense of such service."

It appears from this Act that the Legislature has delegated to the Court of County Commissioners of Talladega County the authority to appropriate out of the general fund of that county such sums as may be necessary to defray the expenses of the services performed by the judge of probate, tax collector and tax assessor of your county in maintaining offices in the City of Sylacauga for the purpose of collecting and assessing taxes. It might be contended that the delegation of this authority to the county governing body of your county is prohibited by Section 44 of the Constitution of Alabama 1901, which said Section provides that the legislative power of this state shall be vested in the Legislature. However, I do not believe that this contention can be upheld, this for the reason that the Supreme Court of this state has held that the Legislature may delegate purely administrative functions to boards of county commissioners or other such boards. **Heck vs. Hall**, 238 Ala. 247, 190 So. 280. In my opinion, the right to fix and appropriate the necessary funds to defray the expenses of this service is merely an administrative function, and is not a prohibited delegation of legislative authority.

From a reading of this Act, it is evident that it was passed by the Legislature to render more efficient and convenient services to those taxpayers living in and around the City of Sylacauga in the assessment and payment of their taxes. It necessarily follows that the Legislature did not intend that the people of that county should not pay for this additional service which the tax assessor and tax collector are required to perform under this Act.

It is to be specifically noted that the county governing body in its resolution fixing the date upon which those offices shall be maintained shall also appropriate from the general fund of the county such sums as may be necessary to defray the expenses of such services. Thus it appears that the county governing body may determine what amount is necessary to defray the expenses of this service, and also has the authority to determine what expenses shall be paid.

I might point out that all of the expenses enumerated in your request are legal and proper if the county governing body of your county so determines. In other words, the county governing body of Talladega County may pay for any expenses rendered by either the tax assessor or tax collector in performing the duties imposed upon him by Act No. 206, supra. If the county governing body elects to pay the traveling expenses of yourselves, meals for yourselves and clerks, rental of office space and clerk hire, and the expenses of the hiring of additional clerks for the performance of this duty, then they may legally do so under the provisions of this Act.

You are, therefore, advised that in my opinion the county governing body of your county may at its discretion pay any and all expenses in connection with the services performed under the provisions of the above named Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 3, 1949.

Hon. J. Shannon Burch,
Judge of Probate,
Russell County,
Phenix City, Alabama.

Veterans—Licenses—Exemptions.

Veterans exempt from payment of business or occupational license taxes by Title 51, Section 864(1), Code of Alabama 1940, include those members of the armed forces serving ninety days or more between September 16, 1940 and "the termination of World War II by the signing of a definitive treaty of peace," and this period will end only with the final and complete settlement of the differences of World War II between the belligerent powers by a conclusive treaty of peace.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of September 8, 1949, is as follows:

"Section 864(1), Code of Alabama of 1940, as amended October 13th, 1947, provides as follows:

" 'Veterans exempt.—Every bona fide permanent resident of the state of Alabama who has served 90 days or more in the armed

forces of the United States between September 16, 1940, and the termination of World War II by the signing of a **definitive treaty of peace** shall, upon sufficient identification, and upon sufficient proof of being a permanent resident of this state, and upon the production of an honorable discharge, from or other proof of the honorable termination of such service, be exempt from business or occupational license taxes for a period of six years after the effective date of this article or for a period of six years after his or her discharge from or termination of service, whichever is later, to the extent and subject to the conditions herein specified. No exemption, however, shall be allowed any such person from the license tax on what commonly are known as rolling stores; nor shall the exemption herein granted be construed as relieving any person from the payment of any license tax for the registration or operation of any motor vehicle.'

"In the first place, I wish to know the meaning of 'the signing of a definitive treaty of peace.' I do not know whether the word 'definitive' is a misprint for the word 'definite' or not. At any rate, I wish to know whether or not, from a legal standpoint in Alabama, such a treaty of peace has been signed.

"If such a treaty of peace has been signed, please inform me of the exact date when it was signed so that I shall be able to correctly determine just what veterans of World War II served 90 days or more in the armed forces of the United States between September 16th, 1940, and the termination of World War II by the signing of such a treaty of peace.

"I have had unofficial information that September 2, 1945, is the date I should consider as the date of such a treaty of peace; however, I have received unofficial information from other sources that merely an armistice was signed on that date and that no definite treaty of peace has as yet been signed. At any rate, I need to know definitely whether or not such a treaty of peace has been in fact signed and, if so, on what date such a treaty of peace was signed. This, in order that I may officially determine as Judge of Probate of Russell County what veterans of World War II are entitled to exemption from business or occupational license taxes as provided in the quoted statute.

"I shall greatly appreciate your prompt assistance to me in this matter."

The term "definitive," in Title 51, Section 864(1), Code of Alabama 1940, is not a misprint, being taken from the original statute, Act No. 353, General Acts 1945, page 570.

The phrase, "the termination of World War II by the signing of a definitive treaty of peace," is interpreted to mean the final and complete settlement of the differences of World War II between the belligerent powers by a conclusive treaty of peace.

To date, no such definitive treaty of peace has been signed. Hostilities in World War II ceased on the date on which Japan officially and formally surrendered to the Allied Powers, September 2, 1945, inasmuch as all of the other enemies of the United States in that war had surrendered prior to that date. See Quarterly Report of Attorney General, Volume 51, page 16. However, neither the United States nor any of the other belligerents have signed a treaty of peace.

The Constitution of the United States declares that the President "shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur." Article II, Section 2, paragraph 2. The power to make treaties is delegated expressly, and by Article VI, treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.

Until such a treaty is signed by the President or his delegated representative, and ratified by the President and Senate, as well as exchanging ratifications with all signatory powers, I cannot say that a definitive treaty of peace has been signed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 3, 1949.

Mr. John D. Chichester, Chairman,
Board of Commissioners,
Alabama Real Estate Commission,
Birmingham, Alabama.

Alabama Real Estate Commission—Fees—Real Estate.

An individual or agency offering apartments or houses for rent for others through newspaper advertising, stating that they have such apartments or houses for rent for others, are considered "real estate brokers," subject to the provisions of Title 46, Sections 298-311, Code of Alabama 1940, whether his compensation is received from the property owners or the prospective renters.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of September 12, 1949, is as follows:

"We would appreciate an opinion from you as to whether or not an individual or agency would be subject to the provisions of Title 46, Sections 298-311, Code of Alabama, 1940, if they secured listings on apartments or houses from the owners of such apartments or houses and in turn advertise such apartments or houses in the want-ad section of the papers, using a trade name including the words 'Apartment Rental Service' or any other type of advertising or wording in newspapers stating they have apartments or houses for rent, and when contacted by a prospective renter, the renter pays a 'fee' of $10.00 and the agency gives him the address of an apartment or house after they call and ask if such apartment or house has been rented if they can contact the owner by phone and telling the owner that the prospective renter will be out to look at the apartment or house. If they cannot contact the owner by phone, they send the prospective renter out to see the apartment or house and in no instance do they accompany them. The prospective renter then goes to see the house or apartment, and if he likes same, handles the rental and all details pertaining to the rental with the owner of the house or apartment and the agency has no further dealings in the matter. In the event the prospective renter does not like the apartment or house, he is given another listing or address and is sent to see this. If he cannot be satisfied within 60 days, the $10.00 'fee' is returned, however, if he is given the address of an apartment and does not go to see such house or apartment, the agency claims they have fulfilled their contract and do not return the $10.00 'fee.'

"Trusting you will give this request your earliest possible attention as it is necessary that we take prompt action in this matter, and thanking you for your cooperation with our Commission in the past."

Title 46, Sections 298-311, Code of Alabama 1940, to which you refer, is, in part, as follows:

"§ 299. A real estate broker within the meaning of this chapter is any person, firm, partnership, co-partnership, association or corporation, who, for a compensation or valuable consideration, sells or offers for sale, buys or offers to buy, negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, rents or **offers for rent,** any real estate or the improvements thereon **for others,** as a whole or partial vocation. . . . A real estate salesman within the meaning of this chapter is any person who, for a compensation or valuable consideration, is employed either directly or indirectly by a real estate broker to . . . . . lease, **to rent or offer for rent,** any real estate, or to negotiate lease thereof, or of the improvements thereon, as a whole or partial vocation. * * * * *." (Emphasis supplied.)

It appears clear that any person who offers real estate for rent for others, unless specifically excepted by the statute, would be classified as either a real estate broker or a real estate salesman representing such a broker.

A "real estate broker," strictly speaking, is but a middleman, whose office is to bring principals together to negotiate with each other. **Allison v. Fuller-Smith & Co.**, 20 Ala. App. 216, 101, So. 626, 628.

The Code further provides that only **one act** for a compensation or valuable consideration for another of leasing, renting, or offering to rent real estate, except as specifically excepted, shall cause the party performing, offering, or attempting to perform to become a real estate broker or salesman. Title 46, Section 299, supra. Offering for rental in the manner described is not within the exceptions listed.

I am of the opinion that the operation described is one of a broker rather than an agent. A broker is distinguished from an agent in that a broker holds himself out for employment by others and acts as an intermediary negotiator between parties to a transaction and is in a sense agent of both parties, whereas element of exclusiveness of representation of principal by which he is employed enters into employment of an agent. **Stumpf v. State**, 31 Ala. App. 409, 18 So. 2d 104.

The manner in which parties conduct their real estate transactions is purely one of optional procedure. As long as they carry on operations designed to lease or offer to lease, rent or offer for rent, their status under the statute will not be changed by a choice of method, so long as they do not violate any laws.

An individual or agency offering apartments or houses for rent for others through various advertising media will be subject to the provisions of Title 46, Sections 298-311, whether his compensation is received from the property owners or the prospective renters. The contractual terms between the rental organization and the prospective renters are not determinative of the rental organization's status under the statute.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 3, 1949.

Hon. A. R. Meadows,
Superintendent,
State Department of Education,
Montgomery, Alabama.

City Boards of Education—County Boards of Education—Schools.

1. Children whose parents live in the areas recently incorporated into the City of Birmingham should not be required

to pay the regular non-resident tuition charged for pupils whose parents now live in Jefferson County outside of Birmingham.

2. The Birmingham City Board of Education may assign children living in the newly incorporated areas to attend the same county schools which they have been attending, where such schools are located outside of the city limits.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of September 21, 1949, is as follows:

"Your opinions on the residence status of the children of school age living in the areas recently annexed by the City of Birmingham are requested as follows:

"1. Should children whose parents live in the areas recently incorporated into the City of Birmingham be required to pay the regular non-resident tuition charged for pupils whose parents now live in Jefferson County outside of Birmingham?

"2. May the Birmingham City Board of Education assign the children living in the newly incorporated areas to attend the same County schools which they have been attending, where such schools are located outside of the City limits?

"Act No. 430, approved August 23, 1949, extends the time which the County of Jefferson and the City of Birmingham may reach agreement on the school which the children are to attend from thirty days to three years."

Title 52, Section 83, Code of Alabama 1940, provides as follows:

"When any part of the territory embracing a school under the supervision and control of the county board of education is annexed to a city having a city board of education by extension of the corporate limits of such city, the county board of education shall retain supervision and control of said school and for school purposes shall retain the same control of the territory and revenues which it exercised prior to such annexation, for the purpose of using and devoting said school to the benefit of all children who were or would be entitled to the use and benefit of the school so long as it was a county school, until an agreement has been made between the county board of education and the city board of education, and the city council or commission or other governing body of the city to which the territory was annexed, with reference to the matter of existing indebtedness and of providing the same or equivalent school facilities for the children in that part of the territory in the school district or districts not annexed or made a part of such city."

Title 52, Section 84, Code of Alabama 1940, as amended by Act No. 430, General Acts 1949, approved August 23, 1949, provides that, in any county having a population of 400,000 or more, if the agreement referred to in Section 83, supra, is not reached within three years after annexation it then shall be mandatory to refer the final disposition of the matter to a board of arbitration, one member to be selected by the county board of education, one to be selected by the city board of education, and the third member to be selected by these two members. In the event that these two members are unable to agree upon selection of the third member, the state superintendent of education shall appoint such third member. By virtue of the limitations of Section 84, supra, Jefferson County stands alone in having three years in which to reach the agreement, since in all other counties the agreement must be reached within thirty days after annexation, else the matter shall be subject to arbitration.

The obvious purpose of Section 83, supra, is to maintain the **status quo** unless and until such an agreement is reached. Although the county school be drawn, by virtue of an extension of the corporate limits, into the territorial jurisdiction of the municipality, the intent of the statute is that the county school be and remain a county school until the agreement is reached. It is to remain under the supervision and control of the county board of education "for the purpose of using and devoting said school to the benefit of all children who were or would be entitled to the use and benefit of the school so long as it was a county school." Until the agreement is reached it remains, for all school purposes, a county school to be devoted to the use and benefit of those children whom it was serving and would serve as a county school. Although by annexation embraced within the territorial jurisdiction of the municipality, it becomes for school purposes a city school only when the agreement is reached and city and county agree on the matter of existing indebtedness and of providing the same or equivalent school facilities for the children in that part of the territory in the school district or districts not annexed or made a part of the city.

Therefore, your first question is answered in the negative, since I assume that you refer to children who, when they lived in the county, were served by the particular county school involved. It is clear from Section 83, supra, that, until the agreement is reached, such school shall continue to operate as a county school for their "use and benefit," which, in my judgment, certainly does not imply the imposition of tuition. Moreover, once the agreement is reached the school becomes, for all school purposes, a city school and I find in the statutes no authority for a city school to charge tuition to a pupil residing within the corporate limits. Authority to impose tuition arises only when a pupil residing in the city attends a school in the county, and **vice versa**, especially where the school attended is the school nearest to the pupil's place of residence. See Title 52, Section 163, Code of Alabama 1940; Biennial Report of the Attorney General, 1928-1930, page 41.

Your second question is answered in the affirmative, upon the assumption that the mandatory agreement required by Section 83, supra,

has not yet been reached, since for all school purposes the children residing in the newly annexed territory must be considered as still residing in the county. Which is to say, until the agreement is reached such children should attend the same county school formerly attended, since that was the school which operated for their use and benefit so long as it was a county school. Until the agreement is reached, it continues for all school purposes to operate as a county school and such children continue to be its lawful charges. Nor, as seen above, does the county board of education have authority to impose tuition against such children now residing within the city, since the county board of education retains the same control of the territory and revenues which it exercised prior to annexation. Once the agreement is reached, children residing within the corporate limits are, for all future school purposes, thenceforth to be considered and assigned as charges of the city. If then they desire to attend the county school and such arrangements are made with the county board of education, they would be liable for payment of tuition as non-resident pupils. See Section 163, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 4, 1949.

Hon. L. W. Brannan, Jr.,
Member, House of Representatives,
Baldwin County,
Foley, Alabama.

Schools—County Board of Education—City Board of Education—Funds.

Local school boards may legally authorize the use of school busses to transport high school bands to and from athletic contests in which such schools are engaged.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of September 2, 1949, is as follows:

"About one year ago you were kind enough to give me an opinion to the effect that a local school unit could use the school buses to transport athletic teams to and from athletic contests. This opinion has had far reaching effect and has accomplished a great deal of good.

"I now request an opinion on the following situation. Many of the high schools have fine student bands and find it impossible to transport their units to and from athletic contests, where they render a great inspiration to their respective teams, due to the fact most school boards will not take the responsibility of authorizing the use of school buses. Can local school boards legally authorize the use of school buses in transporting local school bands to and from athletic contest?

"It seems to me that the same reasoning used in rendering the opinion referred to in the first paragraph can be used in rendering this opinion, since a school band is an integral part of all modern curriculums."

This office has previously held that the county board of education has authority to spend school funds for the purchase of band instruments. Quarterly Report of Attorney General, Vol. 6, page 85; Quarterly Report of Attorney General, Vol. 8, page 320.

This office has also held that the governing body of a county has authority to appropriate funds to aid public high schools in the purchase of music instruments for bands. Quarterly Report of Attorney General, Vol. 51, page 102; Quarterly Report of Attorney General, Vol. 53, page 16.

The State Department of Education informs me that band music is an approved subject in the course of study in the high schoools of the State. Transportation of a high school band to and from athletic contests in which the high school is engaged is in furtherance of the course of instruction in band music. Playing in the band at school athletic contests gives the members of the band an opportunity to demonstrate what they have learned as well as affording them an opportunity to practice as a unit.

In view of the above, it is my opinion that local school boards may legally authorize the use of school busses to transport high school bands to and from athletic contests in which the high school is engaged. Cf. Quarterly Report of Attorney General, Vol. 51, page 124.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 4, 1949.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Offices and Officers—County Hospital Corporation—Justices of the Peace—Member of the County Board of Education.

1. In view of the provisions of Act No. 46, General Acts 1949, approved June 2, 1949, a person serving as a member of the county board of education may not be elected to membership upon the board of directors of a public hospital corporation established under the provisions of such act.

2. Persons serving as Justices of the Peace do not fall within the prohibition of such act and may lawfully be elected and serve as members of the board of directors of such public corporation.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of September 14, 1949, is as follows:

"The Houston County Board of Revenue has appointed 18 Directors to act for the Houston County Hospital Association and are proceeding under the Act #46 as passed by the Legislature of 1949.

"There has arisen a question of the eligibility of certain members to serve as Directors due to the fact they are holding certain official positions in municipal government. One of the named directors is a member of the Houston County Board of Education and two other members are just serving as Justice of Peace.

"Your prompt attention in this regard will be appreciated."

As indicated by your inquiry, Act No. 46, General Acts 1949, approved June 2, 1949, authorizes the incorporation in any county of the state of a public corporation for hospital purposes. You advise that Houston County is proceeding under the authority of such act to establish such a public corporation, and you inquire as to the eligibility of certain persons to serve as directors of such public corporation.

Section 6 of Act No. 46, supra, makes provision for the election of the members of the board of directors of such corporation. The portion of such section pertinent to your inquiry provides as follows:

"* * * No member of the board of directors shall be an officer of the County or of any incorporated municipality in the county."

You inquire as to the eligibility of one serving as a member of the Houston County Board of Education to serve as a member of such board of directors, and likewise as to whether a person holding office as a Justice of the Peace may lawfully serve as a member of such board.

Obviously, each of such persons do hold civil offices of profit, Biennial Report of Attorney General, 1926-28, page 461; Quarterly Report of Attor-

ney General, Volume 32, page 58. The only question which, therefore, arises is whether such offices fall within the prohibition of Act No. 46, Section 6, supra, above quoted, that is, are the holders thereof officers of the county or any incorporated municipality thereof.

My answer as to that person holding office as a member of the County Board of Education of Houston County is in the affirmative, it clearly appearing from the statutes applicable to such office that the holder thereof holds a county office. In this regard, I call your attention to Title 52, Sections 62-63, Code of Alabama 1940, the former providing that the general administration and supervision of the public schools and of the educational interests of the county shall be vested in such board, while the latter provides that the members thereof shall be elected by the qualified electors of the county. This, in itself, convinces me that the holder of such office falls within the prohibition of Act No. 46, supra, above quoted.

However, such is not the case as regards those persons occupying the office of Justice of the Peace within any of the precincts of the county. As you will note, the prohibition found within Act No. 46, supra, is directed only to those persons who are officers of the county or an incorporated municipality thereof. This prohibition is specific, and its terms cannot be enlarged. One holding office as a Justice of the Peace is neither an officer of the county nor an officer of an incorporated municipality thereof, but rather such person is a judicial officer whose jurisdiction and authority extends only to the precinct of his residence. He is best referred to as a precinct officer. Biennial Report of Attorney General, 1928-1930, page 85; Biennial Report of Attorney General, 1934-36, page 232.

Such officer is elected by the qualified electors of his particular election precinct, Section 168, Constitution of Alabama 1901; his jurisdiction and authority extends only to the precinct of his residence, unless otherwise provided for by statute. Biennial Report of Attorney General, 1934-36, page 232, and upon his removing from such precinct he vacates his office. Title 13, Section 392, Code of Alabama 1940.

It is, therefore, my opinion that such person is neither an officer of the county nor of any incorporated municipality thereof, but is rather an officer in and for a certain designated precinct of such county. Such being the case, such person does not fall within the prohibition found within Act No. 46, supra, and may, therefore, be elected to membership upon the board of directors of the county hospital corporation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 4, 1949.

Hon. D. G. Gill, M. D.,
State Health Officer,
Department of Public Health,
CAPITOL.

Appropriations—Expenses—Health and Health Department—Legislature.

The authority of the Governor to rent office space for official use of state officers for whom adequate offices cannot be obtained at the capitol not being exclusive, the Department of Health may rent such space as necessary to perform its functions from funds appropriated to the Department by the Legislature to meet its expenses, provided the space is not available from any other source.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of September 19, 1949, is as follows:

"The State Health Department is confronted with the proposition that the preservation, furtherance and maintenance of public health cannot be carried out in the present space allotments. On the contrary, this important service will be curtailed unless additional facilities for the operation are made available.

"The limitation for office rental provided by the 1949 Legislature prevents rental payments in excess of $22,500.00 for space outside the Capitol buildings. There is no adequate space in the Capitol buildings to take care of all the operations of this Department.

"Your official opinion is respectfully requested on the following proposition:

" 'Does the authority provided by Title 22 of the 1940 Code, specifically Section 99 or any other pertinent provision, permit this Department in the preservation, furtherance and maintenance of public health to include in its annual budget the amount to be expended for the purpose of paying rental in the City of Montgomery, if space is not available from any other source?'

"We are presently occupying space the rental of which expires during this week and it will be greatly appreciated if you will give this matter your prompt attention. I realize that the time is short, but assure you that this matter just came to my attention the last days of last week."

The original authorization for rental by the governor of office space for the official use of state officers for whom adequate offices cannot be obtained in the capitol was by Act No. 323, General Acts 1911, page 376. The governor was authorized, in his discretion, to rent in the city of Montgomery, for such officers, suitable and adequate offices, for such length of time as might be suitable or expedient.

The authorization of Act No. 323, supra, was incorporated into Section 2571 of the Code of Alabama 1923, using the terminology, "the governor **may**, in his discretion, rent, in the city of Montgomery, for use of such officer, suitable and adequate offices, etc." (Emphasis added.) The only change made in Section 2571, supra, by Title 41, Section 29, Code of Alabama 1940, was the addition of the phrase, "with the approval of the department of finance," but restating that "the governor with the approval of the department of finance **may**, in his discretion, rent, in the city of Montgomery, for the use of such officer, suitable and adequate offices, etc." (Emphasis added.)

The original act and the Code sections which have incorporated it do not say that the governor **must** rent suitable and adequate offices whenever they are unavailable in the capitol. Nor does the original act or the Code sections which have incorporated it say that this power of the governor is exclusive, that no agency other than the governor with the approval of the department of finance may rent suitable and adequate offices whenever they are unavailable in the capitol. Also, the Legislature has not set a standard or criteria for "proper and sufficient office accommodation in the capitol" with a command that the governor must conform to their specifications. Rather, the Legislature has said that the governor acting with the approval of the department of finance **may**, in his discretion, rent necessary office space.

The language of the original statute is clear. It set out in a positive manner that which may be done. Yet, it in no manner restricted rentals by state officers of space necessary to perform the functions of their departments, provided appropriations for the departments concerned are adequate to cover such expenditures. Nor have such limitations been placed on the procurement of necessary office space by subsequent incorporations into our Code.

Maximum expenditure for rental of state offices under Section 30 of Title 41 of the Code of Alabama 1940, as amended by Act No. 441, General Acts 1949, Regular Session, (Ms. October 1, 1949), has been set at $22,500 by the General Revenue Act of 1949, Act No. 522, Regular Session 1949, (Ms. October 1, 1949). Since the funds available for the governor to use for this purpose have been limited to an extent that the needs of the Department of Health may not be satisfied from them, this Department must meet their needs from its own funds.

To say that a department cannot expend its own funds for office rental when such expenditure is a necessary expense to the performance of essential services is to ignore the spirit of the original statute, as well

as the purpose to be accomplished. Its practical effect under existing law duly discloses the Legislature could not have intended such result under a rational, sensible construction.

Under Section 5, Subsection 6 of the General Revenue Act of 1949, supra, the Department of Health was appropriated $329,940.00 "for other salaries and expenses." It is my opinion that expenditures for office rental necessary to the preservation, furtherance and maintenance of public health can be budgeted under the category "other expenses," whenever needed space is not available from any other source. This action conforms with the purposes and objects for which the appropriations for the Department of Health were made. The legislative language embodied in the Code is not detracted from nor added to.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 4, 1949.

Hon. Phillip J. Hamm,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

Revenue, Department of—Sales Tax—Taxation—Taxes.

The Department of Revenue may not construe the exemptions from payment of Alabama sales tax granted by Title 51, Section 755, Subsection (k), Code of Alabama 1940, for gross proceeds of the sale or sales of coal or coke to include the gross proceeds of the sale of wood or fuel oil used for the same purposes.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of September 16, 1949, is as follows:

"Subsection k, Title 51, Code of Alabama 1940, provides exemption from the Alabama sales tax for the gross proceeds of the sale or sales of coal or coke to manufacturers, electric power companies, and transportation companies for use or consumption in the production of by-products, or the generation of heat or power used, in manufacturing tangible personal property for sale, for the generation of electric power or energy for use in manufacturing tangible personal property for sale or for re-sale, for the generation of motive power for transportation.

"Please advise me if, in your opinion, this exemption can be legally construed to include the gross proceeds of the sale of wood or fuel oil used for the same purposes."

Title 51, Section 755, Subsection (k), Code of Alabama 1940, to which you refer, definitely and in unequivocal language declares that the gross proceeds of the sale, or sales of **coal** or **coke** to the parties described and for the purposes outlined may be exempt from the Alabama sales tax. There is no indication in the language of this Code provision that any substitute fuels used by the same parties for the purposes outlined are included. The exemption provisions of this section of our Code should not be extended by implication, beyond the clear import of the language used, or so as to embrace matters not specifically pointed out."

As a general rule, grants of tax exemptions are given a rigid interpretation against the assertions of the taxpayer and in favor of the taxing power. In re **Chafin's Will**, 210 Wis. 675, 247 N. W. 325.

It is my opinion that the exemption granted by Subsection (k), supra, for the gross proceeds of the sale or sales of coal or coke cannot be construed to include the gross proceeds of the sale of wood or fuel oil used for the same purposes.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 5, 1949.

Hon. B. W. Simmons, Judge,
22nd Judicial Circuit,
Covington County,
Andalusia, Alabama.

Bailiffs—Costs and Fees—Circuit Courts.

Bailiffs appointed under the provisions of Title 13, Section 186, Code of Alabama 1940, as amended, should be paid $5.00 per day for each day they actually serve in court, as provided in Act No. 246, General Acts 1949 (Ms.), approved July 18, 1949.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of August 27, 1949, is as follows:

"The Governor approved Act No. 246 on July 18, 1949. This act provided, among other things, that the bailiff should receive $5.00 per day.

"On August 16, 1949, the Governor approved Act No. 407. This act amended section 187 and reinacted the provision of the original act that the bailiff should receive $3.00 per day.

"Will you please advise me whether a bailiff should be paid $5.00 per day or $3.00 per day in view of Act No. 407."

Title 13, Section 186, Code of Alabama 1940, was amended by Act No. 561, General Acts 1947, page 397. The purpose of this amendment was to fix the compensation of bailiffs appointed under said section. Until this amendment the compensation of bailiffs appointed under Section 186, supra, was provided for in Title 13, Section 187, Code of Alabama 1940. Section 187, supra, deals primarily with the appointment of bailiffs in certain judicial circuits of the State, and fixes their compensation and duties. Section 187 was amended by Act No. 257, General Acts 1947, page 109. However, notwithstanding the fact that Section 186, as amended by Act No. 561, supra, fixed the compensation of bailiffs appointed thereunder, the amendment to Section 187 still retained the provision that "bailiffs actually serving in court shall receive three dollars a day for every day they serve." It is my conclusion that such action on the part of the legislature was merely an oversight.

Under the provisions of Section 186, supra, as amended by Act No. 561, supra, the compensation of bailiffs appointed under said section was fixed at $3.00 per day for every day they actually served in court, except that in counties of not less than 76,000 and not more than 114,000 inhabitants (Tuscaloosa County), such compensation was fixed at $5.00 per day for each day such bailiffs actually served in court. Section 186 was again amended by Act No. 246, General Acts 1949 (Ms.), approved July 18, 1949, the purpose of such amendment being to fix the compensation of all bailiffs appointed under said section, as amended, in all counties of the State at $5.00 per day for each day they actually serve in court. Section 187, supra, was again amended by Act No. 407, General Acts 1949 (Ms.), approved August 16, 1949, the amendment still retaining the provision that "bailiffs actually serving in court shall receive three dollars a day for each day they serve." It is my conclusion that again this action on the part of the legislature was due to an oversight.

In view of the fact that the legislature saw fit on two occasions to fix the compensation of bailiffs appointed under the provisions of Section 186, supra, under the provisions of the statute specifically dealing with their appointment, it is my conclusion that it was the intention of the legislature that the compensaion of bailiffs appointed under the provisions of Section 186, supra, as amended, should be paid under the statute authorizing their appointment and not under Section 187, as amended, supra.

It is, therefore, my conclusion that bailiffs appointed under the provisions of Title 13, Section 186, Code of Alabama 1940, as amended, supra, should be paid $5.00 per day for each day they actually serve in court,

as provided in Act No. 246, General Acts 1949 (Ms.), approved July 18, 1949.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 5, 1949.

Hon. H. J. Brogden,
Judge of Probate,
Covington County,
Andalusia, Alabama.

Constitutional Law—Statutes.

Act No. 468, General Acts 1945, page 704, reducing the number of jurors in a sanity inquisition from twelve to six in number does not violate Section 11 of the Constitution of Alabama 1901.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 7, 1949, is as follows:

"Does Act No. 468, General Acts of 1945, page 704, amendatory of Section 12, Title 21, Code of 1940, violate section 11 of the Constitution of 1901, in that it reduces the number of jurors below the number fixed by the Constitution?

"I call your attention to the fact that the legislature prior to 1867 fixed the number of jurors at twelve in number, and that section 11 of the present Constitution appeared in the constitutions of 1819, 1861, 1865, 1868, 1875.

"My attention has been called to cases as follows: 87 So. p. 592; 103 So. 540; 26 Ala. 165; 44 Ala. 721; 36 Ala. 252; (number of jurors) Skinner's Alabama Constitution—note G(1) with cases cited.

"It occurs to me that in view of the above citations which have been called to my attention that the legislature is without power to reduce the number of jurors from 12 to 6—that such reduction amounts to a denial of a trial by jury that was provided by the legislature as far back as 1867 and before and reaffirmed by the several constitutions since that date."

My answer to your inquiry is in the negative.

Act No. 468, General Acts 1945, page 704, amends Title 21, Section 12, Code of Alabama 1940, by reducing the number of jurors in a lunacy or sanity hearing from twelve to six.

Section 11, Constitution of Alabama 1901, reads as follows:

"The right of trial by jury shall remain inviolate."

While I have been unable to find where the appellate courts of this State have passed on this question, I do find that the text writers and courts of last resorts of other states have had occasion to consider your precise question.

In 28 American Jurisprudence, page 666, the following statement is made:

> "At common law, the hearing on a writ of de lunatico inquirendo was had before a jury, for the obvious reason that the profits of the estate of a lunatic during his infirmity passed to the Crown. Under modern law and practice, however, property rights are not affected by an adjudication of insanity; and it is held in several jurisdictions that it is permissible for the legislature to dispense with trial by jury in an inquest to discover insanity, as, for example, by providing for the determination of the question, whether one alleged to be incompetent is in fact insane, by a board of commissioners, or by vesting jurisdiction in cases of insanity in the chancery court, to which a jury does not ordinarily belong. A jury trial in an insanity proceeding is not essential to due process. It has been asserted that the guaranty of the right to a jury trial in the Federal Constitution is inapplicable to insanity proceedings in state courts, and further that the phrase 'due process of law,' as used in the Fourteenth Amendment, does not comprehend a jury trial in insanity inquisitions in states where the usage and statutes provide otherwise; or expressed differently, 'due process,' in this connection, is regulated by the law of the forum. * * * * * * According to some authority, since an inquest in insanity is a special proceeding, the primary object of which is to secure the proper care and protection of a person found therein to be insane, such a proceeding is not within a constitutional provision which contains a guaranty of the right to a jury trial in criminal prosecutions and in cases involving the life or liberty of an individual."

It is to be noted from the above statement in American Jurisprudence, that a lunacy proceeding is not within a constitutional provision which contains a guaranty of the rights to a trial by jury in criminal prosecution. In line with the above, it has been generally held that statutes providing for a jury trial in insanity or incompetency inquisitions are not subject to objections as to the number composing such a jury or as to the number that must unite in a verdict. In **Re Shackleford,** 188 Cal. 274,

204 Pac. 822; **State vs. Linderholm**, 84 Kansas 603, 115 Pac. 857; **Fant vs. Buckhannon**, 17 So. 371; **In Re Lindsey**, 46 N. J. Equity 358, 19 Atlantic 726; **DeHart vs. Candit**, 51 N. J. Equity 611, 28 Atlantic 603; **Groves vs. Ware**, 182 N. C. 553, 109 S. E. 568.

The case of **Fant vs. Buckhannon** is the Mississippi case and it conclusively holds that the legislature has authority to reduce the number of jurors to serve in an insanity or incompetency inquisition.

In view of the above, and specifically in view of the fact that property rights are not affected by an adjudication of insanity, I am constrained to hold that Act No. 468, supra, is not violative of Section 11 of the Constitution of Alabama 1901.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 5, 1949.

Hon. W. H. Drinkard,
Director of Finance,
State of Alabama,
CAPITOL.

Appropriations—Statutes—Officers and Offices.

1. The Legislature may make a lump sum appropriation for the operation of an office or department of the State, without itemizing or earmarking certain parts thereof for certain specific purposes.

2. If the Legislature, in making such an appropriation, itemizes or earmarks only a part of the total for certain specific purposes, the amount not itemized or earmarked may be expended for any legitimate purpose of the office or department to which the same is appropriated, subject, however, to allotment thereof in accordance with the provisions of Title 55, Section 102, Code of Alabama 1940.

3. If the Legislature, in making an appropriation to an office or department of the State, itemizes or earmarks certain amounts for certain specific purposes, and the total of such itemized or earmarked amounts is greater than the lump sum total of the appropriation to the office or department, as shown in the act, then the actual total of such amounts, rather than the lump sum total as shown in the act, governs, and the respective amounts appropriated for each specific purpose are the amounts which may be expended for such purpose.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of September 15, 1949, is as follows:

"The Budget Division is now engaged in the preparation and approval of allotments for the first quarter of the fiscal year 1949-50. These allotments, of course, are based upon appropriations as provided by the Legislature in Act No. 522, approved September 2, 1949.

"The Budget Division is confronted with a problem in making the allocations as to the amount provided in the appropriation bill, that is to say, specifically Act No. 522 provides in Item III of Section 1, as follows:

"'III. JUDICIAL:
"(1) THE SUPREME COURT:

"For the salaries of the Chief Justice and six Associate Justices	$ 66,500.00
"For the salary of the Clerk of the Court	4,500.00
"For the salary of the Court Reporter	4,800.00
"For other salaries	28,320.00
"For other expenses	6,880.00
"TOTAL	$111,100.00'

"You will note that the amount appropriated for the salaries, for other salaries, and for other expenses is the total of $111,000.00; the total in the appropriation bill appears as '$111,100.00.'

"Item IV of Section 1 of said Act No. 522 provides as follows:

"'IV. CONSTITUTION OFFICES:
"(1) OFFICE OF THE ATTORNEY GENERAL:

"For the salary of the Attorney General	$ 5,700.00
"For other salaries	84,300.00
"For other expenses	12,500.00
"Total	$103,500.00'

"Your attention is invited to the fact that the same type of error occurs in this appropriation. The amount provided for salaries and for expenses totals $102,500.00; the total as shown in the bill is '$103,500.00.'

"Also, under Item IV of Section 1 of said bill appears the following:

"'(4) OFFICE OF STATE TREASURER:

"For the salary of the State Treasurer	$ 4,800.00
"For other salaries	44,500.00
"For other expenses and compensation of fiscal agents	10,350.00
"Total	$58,500.00'

"In this instance the salaries and the other expenses appropriated total $59,650.00; the total appearing on the face of the bill is '$58,500.00.'

"In order for the Budget Division to make the proper allocation of these funds, we deem it advisable that you render your official opinion and we request your official opinion as to whether or not the total amount set out as total in the appropriation bill is the controlling and maximum amount to be expended, or does the amount as set out specifically for salaries, other salaries, and other expenses, etcetera, determine the amount appropriated for such specific uses as stated in the bill.

"In the event that you find that the detailed appropriations for the specific uses shall control as the appropriation made by the Legislature, we have no further problem with reference to the amounts of allocation. However, should you find that the total as provided by the bill is the controlling factor, we are then presented with the problem of allocating the additional amount which in the first instance (the Supreme Court) would be $100.00, and in the second instance (office of the Attorney General) would be $1,000.00. Your official opinion is requested as to the manner in which the additional sums herein stated may be allocated and spent for that there is no provision for such expenditure provided in the detail set out in the bill.

"It is necessary that the allotments be made up and presented to the Governor for approval prior to the beginning of the new fiscal year and for that reason, I request your usual prompt attention and thank you in advance for same."

The General Appropriation Act of 1949 is Act No. 522, General Acts 1949, approved September 2, 1949, and effective on October 1, 1949.

Constitution of Alabama 1901, Section 71, provides what appropriations may be embraced in the general appropriation bill; and Constitution of Alabama 1901, Section 72, provides that no money shall be paid out of the treasury, except upon appropriations made by law.

You correctly quote in your letter of inquiry those parts of the General Appropriation Act of 1949, supra, dealing with the appropriations to the Supreme Court, the office of the Attorney General, and the office of State Treasurer. Appropriations to each of these offices or departments of the State are "appropriations for the ordinary expenses of the

executive, legislative and judicial departments of the State"—appropriations which may be embraced in the general appropriation bill under Section 71, supra.

The Legislature, in making appropriations to each of these offices or departments, could have complied with the provisions of Section 72, supra, by simply making a lump sum appropriation to it, without itemizing or earmarking any parts thereof for certain specific purposes. Indeed, such lump sum appropriations have many times been made by the Legislature, and some such lump sum appropriations are contained in Act No. 522, supra, e. g., the appropriation to the Highway Patrol Division of the Department of Public Safety, contained in Subdivision (1) of Subsection XXII of Section 1 thereof. This being the case, an appropriation of $111,100 to the Supreme Court, without any itemization or earmarking of any part thereof for any certain specific purpose would have been sufficient, so far as the requirements of Section 72, supra, are concerned; and, in such an event, the entire amount of $111,100 could have been expended for any legitimate purpose of the Supreme Court, subject, of course, to the provisions for the allotment thereof contained in Title 55, Section 102, Code of Alabama 1940. However, it appears that the Legislature saw fit to itemize or earmark for certain specific purposes all of the $111,100 appropriated by it to the Supreme Court, with the exception of $100, which it had the authority to do. Since it did not see fit to itemize or earmark $100 of the total amount appropriated by it to the Supreme Court for any certain specific purpose, this $100 may be used for any legitimate purpose of the Supreme Court, subject to the provisions for the allotment thereof contained in Section 102, supra, just as would have been the case in regard to the entire appropriation of $111,100 had the Legislature not seen fit to itemize or earmark any part thereof for any certain specific purpose.

The situation in regard to the appropriation to the office of the Attorney General is identical with the situation in regard to the appropriation to the Supreme Court, except that of the total amount of $103,500 appropriated to the office of the Attorney General, the Legislature saw fit to itemize or earmark all of it for certain specific purposes, except $1,000. The same reasons which led to the conclusion that the $100 of the appropriation to the Supreme Court, which was not itemized or earmarked for a certain specific purpose, may be used for any legitimate purpose of the Supreme Court, subject to the provisions for the allotment thereof contained in Section 102, supra, lead me to the conclusion that the $1,000 of the appropriation to the office of the Attorney General, which was not itemized or earmarked for a certain specific purpose, may be used for any legitimate purpose of the office of the Attorney General, subject to the provisions for the allotment thereof contained in Section 102, supra.

The situation in regard to the appropriation to the office of State Treasurer is the converse of the situation in regard to the appropriations to the Supreme Court and the office of the Attorney General. In other words, the Legislature has appropriated certain specific amounts for

certain specific purposes for the office of State Treasurer, the actual total of which is $1,150 more than the total which is shown in the Act as being appropriated to the office of State Treasurer.

At first blush, it might appear that, in view of the conclusions reached above in regard to the appropriations to the Supreme Court and the office of the Attorney General, a conclusion would have to be reached in regard to the appropriation to the office of State Treasurer that the total amount appropriated to it was the total amount shown in Act No. 522, supra, rather than the actual total of the specific amounts appropriated to it for certain specific purposes. However, such a conclusion would lead to confusion, in that $1,150 would have to be deducted from one or more of the specific appropriations made for certain specific purposes to the office of State Treasurer, with no guide whatsoever as to the specific appropriation or appropriations from which the same should be deducted. Such an impractical result should be avoided. See 18 Ala. Dig., Statutes, Key No. 181(2), and cases there cited and collated.

Therefore, I conclude that the several specific amounts appropriated for certain specific purposes of the office of the State Treasurer, totaling $59,650, are the amounts which may be expended for those respective purposes, subject to the provisions for the allotment thereof contained in Section 102, supra, rather than the amount of $58,500 shown in Act No. 522, supra, as being the total amount appropriated therein for the office of State Treasurer.

Admittedly, the conclusions here reached are not entirely free from doubt, and, while they may appear to be contradictory, I am convinced that they are in accord with the legislative intent.

The fundamental rule in the construction of statutes is to ascertain and give effect to the intention of the legislature, and all other rules for construing statutes must be regarded as subservient to the end of determining the legislative intent. 18 Ala. Dig., Statutes, Key No. 181(1), and cases there cited and collated.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 6, 1949.

Hon. Elgin W. Mellown,
Superintendent, Board of Education,
Sumter County,
Livingston, Alabama.

Counties—County Board of Education.

1. A county board of education is an independent agency of the State of Alabama, exercising a public governmental function and is, therefore, not liable for the negligence of its officers, agents, or employees.

2. A county board of education being an independent agency of the State of Alabama, the provisions of Section 235, Constitution of Alabama 1901, are inapplicable thereto and no claim may be made nor action maintained against such board under the authority of such constitutional provision.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 11, 1949, is as follows:

"The Sumter County Board of Education authorized a project for the construction of an athletic field and the improvement of the school grounds at York, Alabama. The Board decided to proceed with the project by employing labor and machinery on an hourly basis rather than by contracting for the job. The high school principal was assigned the duty of supervising the work.

"On December 14, 1948, in the course of opening a new channel for a branch across the property, blasting was resorted to. A person who had had experience with this type of work was employed to do the blasting. A charge of dynamite caused large particles of mud to be thrown on and against nearby houses and an automobile, resulting in considerable damage to the automobile and to two of the houses.

"The owner of the automobile did not have insurance and claim for the damages sustained was submitted to the Board of Adjustment. The Board of Adjustment settled the claim as to the car.

"The owners of the houses damaged had extended coverage insurance and, because of this fact, their claims could not be submitted to the Board of Adjustment. The insurance companies settled with the owners of the houses for damages sustained.

"The company which had insured the home of Mr. C. H. Hamilton paid him $772.98. The insurance company had their attorneys, Davies and Williams, of Birmingham, submit a claim to the Sumter County Board of Education for $772.98 to reimburse the insurance company for the amount it had paid Mr. Hamilton. This claim was referred to the State Board of Adjustment. It is my understanding that the State Board of Adjustment refused the claim on the basis of a recent Supreme Court decision.

"The attorneys for the insurance company have again presented the claim on the C. H. Hamilton residence in the amount of $772.98 to the Sumter County Board of Education demanding payment, and citing section 235 of the Constitution of Alabama as a basis on which such claims should be paid.

"Your opinion is requested as to whether or not the County Board of Education is authorized to pay this claim."

My answer to your inquiry is in the negative.

Clearly, under all of the decisions of the Supreme Court of this State, as well as those of many of our sister states, a county board of education, though it may sue and be sued to a limited extent, may not be sued on a claim arising from the negligence of one of its servants or agents, this, for the reason that the county board of education is an independent agency of the State, acting in a public and governmental capacity. Such holding is found announced in the cases of **Turk v. County Board of Education of Monroe County**, 222 Ala. 177, 131 So. 436; **Ex parte Board of School Commissioners of Mobile County, Daves et al v. Rain**, 230 Ala. 304, 161 So. 108; **Hawkins v. State Board of Adjustment et al**, 242 Ala. 547, 7 So. 2d 775, and the voluminous citations of authorities found within the above-cited cases. It, therefore, seems beyond argument that a tort action could not be maintained against the county board of education for the damages mentioned in your inquiry.

However, you advised me in your request for opinion that attorneys for the insurance company concerned have cited to you the provisions of Section 235, Constitution of Alabama 1901, as constituting authority for the payment of such claim. I find it impossible for me to place myself in agreement with such argument or contention.

The provisions of Section 235, supra, first appeared in the Constitution of Alabama of 1875 as Section 7, Article 14 thereof, and serve to extend and enlarge the privileges and rights, previously as well as presently, granted by Section 23 of the Constitution of Alabama 1901. The history and purposes sought to be accomplished by such constitutional provision (Section 235) have been treated in a long line of decisions by the Supreme Court of this State, including **City Council of Montgomery v. Maddox**, 89 Ala. 181, 7 So. 433; **Dallas County v. Dillard**, 156 Ala. 354, 47 So. 135; **Duy v. Alabama Western Ry. Co.**, 175 Ala. 162, 57 So. 724; **Finnell v. Pitts**, 222 Ala. 290, 132 So. 2; **Hunter et al v. City of Mobile**, 244 Ala. 318, 13 So. 2d 656, and **Brock et al v. City of Anniston**, 244 Ala. 544, 14 So. 2d 519, among others.

It is true that Section 235, supra, does provide that municipal and other corporations and individuals invested with the privilege of taking property for public use must make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways or improvements. However, by a long and unbroken line of decisions, the Supreme Court of this State has held that the

provisions of this section are not applicable to the State of Alabama itself. See **Finnell v. Pitts,** supra; **Duy v. Alabama Western Ry Co.,** supra; **Hunter et al v. City of Mobile,** supra, and **Brock et al v. City of Anniston,** supra.

As stated by the Supreme Court, in the case of **Duy v. Alabama Western Ry. Co.,** supra:

> "As to the state itself, the sole restraint in the particular now important is Const. § 23, wherein it is provided that 'private property shall not be taken for, or applied to, public use, unless just compensation be first made therefor.' Section 235 is addressed to the restraint of 'municipal and other corporations and individuals invested with the privilege of taking property for public use.' This latter section does not apply to the state itself in the exercise of its sovereign power in restraint of which, in so far as we are now concerned, Const. §23, alone operates."

The question, therefore, arises as to whether a county board of education, when engaged in its governmental function, is in fact an arm or agency of the State of Alabama and, hence, not subject to the provisions of Section 235, supra. In my judgment, such question must be answered in the affirmative.

In its opinion rendered in the case of **Turk v. County Board of Education of Monroe County,** supra, the Supreme Court, after noting that the county board of education had been designated as a quasi corporation, an independent agency of the State for the purposes enumerated in the statute, quoted with approval the following from 19 R. C. L., page 1124.

> "In this country it is regarded as the duty of the state to establish and maintain at the expense of the tax payers a system of education for all children who live within its limits, and if, for purposes of convenient administration, this duty is delegated to the municipal corporations of the state, or to quasi corporations formed for the purpose, the duty is still public and governmental, and such corporations, or quasi corporations, cannot be held liable for the negligence of their employees in performing it."

Such question finds even clearer answer in the opinion of the Court rendered in the case of **Hawkins v. State Board of Adjustment et al,** supra, wherein the Court determined the specific question of whether the State Board of Adjustment had jurisdiction of a claim for the negligence of a servant or agent of the county board of education. The Court, after setting out the fact that the authority of the Board of Adjustment extended to claims for damages to a person growing out of an injury done him "by the State of Alabama, or any of its agencies, commissions, boards, institutions or departments," proceeded to determine that a county board of education was such an agency, board, etc., of the State of Alabama and that, therefore, the Board of Adjustment could take

cognizance of claims arising from the negligence of a servant or agent thereof. In such opinion, the following is set out:

> "This Court has held that a county board of education could sue and be sued to a limited extent, but not on a claim arising from the negligence of one of its servants or agents because it is an independent agency of the State, not one which is immediate, but nevertheless it is acting in a governmental capacity. Turk v. Board of Education, 222 Ala. 177, 131 So. 436; Ex parte Board of School com'rs of Mobile County, 230 Ala. 304, 161 So. 108. Those cases, following Shepherd v. Jones, 228 Ala. 307, 153 So. 223, make a separate classification of strictly State boards and commissions, including State colleges and describe them as immediate and strictly governmental agencies, not subject to suit. But that a county board of education, while not an immediate agency of the State, acts in a public and governmental capacity, and therefore is not liable for the torts of its agents and employees, while so engaged, but is ordinarily otherwise subject to suit. Its funds are State funds. State v. Tuscaloosa County, 233 Ala. 611, 172 So. 892; Williams v. State, for Use and Benefit of Pickens County, 230 Ala. 395, 161 So. 507."

It is, therefore, my opinion that inasmuch as the provisions of Section 235, supra, are not applicable to the State of Alabama, such immunity extends to those agencies, commissions, boards, institutions and departments of the State exercising public governmental functions and that as a consequence thereof, the provisions of such constitutional provisions are inapplicable to the county board of education, an admitted and accepted independent agency of the State of Alabama. I can conceive of no logical reason whereby it might be said that such immunity extends to certain agencies, boards, etc., and not to others, nor do I feel it to have been the intent of the framers of such constitutional provision that such be the case. It is rather my opinion that the State of Alabama, together with all the agencies, commissions, boards, institutions and departments of such sovereign are exempt from the provisions of Section 235, supra.

It is quite true that had the damage here complained of have been occasioned by a municipality, other corporations, including a county, or any individual invested with the right of eminent domain, damages might have been claimed or action maintained under the provisions of Section 235, supra, but such is not the case in those instances where, as here, the damage complained of was occasioned by an independent agency of the State of Alabama.

I must, therefore, advise that the county board of education is without authority to pay the claim mentioned in your inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 6, 1949.

Hon. G. W. Hughes,
Madison County,
Madison, Alabama.

Municipal Corporation—Commission Form of Government.

1. In those municipalities becoming organized under the commission form of government pursuant to the provisions of Title 37, Sections 89-119, Code of Alabama 1940, as amended, the members of the newly elected board of commissioners shall elect one of their number to serve as mayor-president for the term specified therein.

2. Such board of commissioners shall meet and transact the business of such municipality in accordance with the provisions of Title 37, Section 98, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of September 7, 1949, is as follows:

"You have no doubt noticed and are aware of the fact that Madison recently changed to a commission form of government from an aldermanic form and now we are not clear as to just how to proceed and neither is the attorney that advises us, it seems.

"As the town is less than 500 we contend that the Mayor is carried over as Chairman of commissioners and also is it legal or just a custom to proceed by parliamentary rules? If so unless all three commissioners agreed how could a motion be made and seconded provided one of them did not wish to go along and would neither second or make the motion?

"I am sending you a letter from Ala. League of Municipalities that attempts to explain the question I asked but I am of the opinion that another ruling either in 45 or 47 was made on this.

"Would you be so kind as to let me hear from you before next Tuesday, our regular meeting night."

As indicated in the letter addressed to you by the attorney for the Alabama League of Municipalities, copy of which is attached to your request for opinion, there are two methods by which a municipality of this State may become organized under the commission form of government, as distinguished from the mayor-aldermanic form. However, in view of the fact that you advise me that the town of Madison is of less than 500 population, only one of such methods of organization would

be open to that municipality. The statutes governing such organization are found set out within Title 37, Sections 89-119, Code of Alabama 1940, as amended. Answer to the first portion of your inquiry is found within Title 37, Section 95, supra, as amended by Act No. 295, General Acts 1945, page 490. This particular statute, as amended, supra, provides as follows:

> "The commissioners provided for in this article shall be known collectively as the board of commissioners of such city, and shall have the powers and duties herein provided. Each of said commissioners shall qualify for office in the manner prescribed in sections 102 and 103 of this title on or before the second Monday following the date of the election by which the board is filled or completed. As soon as they thus shall have qualified for office, such city shall then and there be and become organized under the commission form of government provided under this article, and all three of said commissioners shall forthwith take office and enter upon their duties. **Immediately upon said commissioners taking office they, by a majority vote, shall elect one of their number as mayor and he shall be president of the board of commissioners of said city, and in addition to the other duties and powers given him by the provisions of this article he shall be invested with all of the powers, jurisdiction and functions, and be charged with all the duties which may be conferred or imposed upon him by said board, except that he shall not have the power to veto any ordinance.** The mayor-president of the board of commissioners may hold that office for one year but he may not be elected to succeed himself." (Emphasis supplied.)

It is clear from the provisions of the above statute that the incumbent mayor of such municipality at the date of the adoption of the commission form of government does not, by virtue of holding such office, thereby become the mayor-president of such commission, but rather than the commissioners elected, including the incumbent mayor, shall elect one of their number who shall become mayor-president for the term of office designated therein.

Regarding the second portion of your inquiry relative to the method by which the commissioners shall proceed in the transaction of the business of the municipality, I call your attention to Title 37, Section 98, Code of Alabama 1940, wherein you will find the same set out. A reading of this statute, I am sure, will disclose that the impediment which you fear will not, and could not, exist, it being there provided that the affirmative vote of two members of said board shall be necessary and sufficient for the passage of any resolution, bylaw, or ordinance, or the transaction of any business of any sort by the board. In view of the fact that such board is composed of three voting members, I fail to see whereby the objection you raise could ever arise.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 6, 1949.

Hon. Jeff D. Smith, Solicitor,
23rd Judicial Circuit,
Madison County,
Huntsville, Alabama.

Offices and Officers—Conviction of crime.

A municipal officer who is convicted of a crime during his term of office comes within the purview of Title 41, Section 162, Code of Alabama 1940, and upon such conviction vacates his office.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 20, 1949, is as follows:

"In a recent term of the Madison County Circuit Court a Commissioner for the City of Madison, Alabama, was convicted of the offense of possessing a gaming table and under our statute our Judge sentenced him to a term of hard labor for the County.

"Your attention is invited to Section 162 of Article 1, Chapter 5, Title 41 of 1940 Code of Alabama, which is as follows:

" 'When any person, holding any office or place under the authority of this state, is sentenced by any court of the United States, of this state, or any state, to imprisonment in the penitentiary, or hard labor for the County, his office or place is vacated from the time of the sentence; and if the judgment is reversed he must be restored; but if pardoned, he must not.'

"Would you please render an official opinion as to whether or not a Commissioner of the City of Madison holding office under Article 2, of Title 37, of the 1940 Code of Alabama comes within the above statute.

"I might add that this Commissioner was formerly the Mayor of the City of Madison prior to the adoption of the Commission form of Government and as such Mayor became one of the Commissioners of said City after the adoption of the said form of Government. The crime of which he was charged was committed during his term of office as Mayor, but he was convicted while serving as Commissioner.

"Your promptness will be appreciated."

My answer to your inquiry is in the affirmative.

In the case of **State vs. Stone,** 213 Ala. 130, 104 So. 894, the Supreme Court held that Section 155(8) of the Code of 1907, which was the predecessor to Section 162, supra, applied to a county office.

In that case is contained a very pertinent statement in regard to Section 162, supra. This statement is as follows:

> "This section is to be considered in connection with section 60 of our Constitution, which reads as follows:
>
> " 'No person convicted of embezzlement of the public money, bribery, perjury, or other infamous crime, shall be eligible to the Legislature, or capable of holding any office of trust or profit in this state.'
>
> "Said section 1558 is, in our opinion, in harmony with this latter provision of our Constitution, and was enacted to give force and effect thereto. Very clearly, if one who has been convicted of an infamous crime shall not be 'capable of holding any office of trust or profit in this state,' as plainly provided in section 60, supra, then manifestly, a statute which provides for the office to be vacated from the time of the sentence, and the restoration to office in the event a reversal of the judgment, is but a recognition of this constitutional provision, and properly enacted for its more efficient enforcement."

It is to be noted from the above that Section 60 of the Constitution of 1901 is the forerunner of Section 162, supra. In fact as stated in the above quoted quotation, Section 162, supra, was enacted by the Legislature to give force and effect to Section 60 of the Constitution.

It is plain, therefore, that Section 60 of the Constitution recognizes the fact that for the proper and orderly administration of governmental affairs an officer shall not serve who rests under the stigma of conviction for a crime. Section 162, supra, follows in the very wake of this constitutional provision, vacates the office pending such judgment of conviction and very generously provides a restoration to the office immediately upon a reversal of the judgment.

You are, therefore, advised in my opinion Section 162, supra, applies to a municipal official as well as to a state or county official, and the Commissioner for the City of Madison, Alabama, mentioned in your request, has vacated his office, having been convicted of the offense of possessing a gaming table. I might add that it is immaterial that this person was Mayor of the City of Madison prior to the adoption of the commission form of government, this for the reason that when he was convicted of the crime he was serving as commissioner, and it is immaterial when the crime was committed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 6, 1949.

Hon. Sim L. Howell, Chairman,
Hon. Wallace Meadows, Member,
Board of Revenue and Control,
Morgan County,
Decatur, Alabama.

Highways and Highway Department—Counties.

When construction is begun on a farm to market road entirely on an existing right of way which the county had, and the deeds to which have been on file in the office of the judge of probate of the county since 1933, and it is decided that an additional right of way five feet in width should be obtained on each side of an existing right of way for protective purposes, Section 10 of the Farm to Market Road Act of 1943 (Act No. 329, General Acts 1943, page 311) does not operate to prevent the State Highway Department from reimbursing the county for work done on such road prior to the time deeds to the additional right of way are filed and recorded in the office of the judge of probate of the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of September 2, 1949, is as follows:

"Re: Farm to Market Road Act of 1943.

"An opinion is desired on the authority of the Highway Department to reimburse Morgan County for work done under the following circumstances:

"Section 10 of the above act (1943 Acts 311) provides that the deeds for right of way shall be filed and recorded in the office of the Judge of Probate of the county before the beginning of road construction. Assuming that the county had a right of way fifty feet in width, and that the deeds thereto have been on file in the office of the Judge of Probate since 1933, and that all steps have been taken and full compliance had with all other sections of the 'Farm to Market Road Act' in constructing a road entirely on the existing right of way, would the fact that, after construction was started on the road, an additional five feet on each side of the existing right of way was obtained for protective purposes, and deeds thereto then recorded, prevent the State Highway Department from reimbursing or participating with the county for work done."

"This is State and county funds only on roadway work."

Section 10 of the Farm to Market Road Act of 1943 (Act No. 329, General Acts 1943, page 311), which said act has been several times amended but in respects not here material, reads as follows:

> "The county shall at its own expense, and without expense to the Highway Department, procure the right of way for such roads, and the cost of right of way shall not be taken or considered as a part of the cost of construction. All deeds or other muniments or other evidence of title for right of way shall be filed and recorded in the office of the judge of probate of the county prior to the beginning of any construction of such roads."

This section was construed by this office in an opinion appearing in Quarterly Report of Attorney General, Vol. 50, page 99, wherein it was said:

> "It plainly appears from the above quoted section that work shall not be begun on farm to market roads, in which the State Highway Department participates, until all right of way deeds shall have been secured and filed for record in the office of the judge of probate of the county in which such roads are located. To reimburse a county for work on a project begun before the securing and recording by it of all right of way deeds on the project would be in clear violation of the provisions of this section. The provisions of this section are clear, plain and unambiguous and admit of no construction whatsoever.
>
> "You are, therefore, advised that, in my opinion, the State Highway Department may not reimburse a county for work done on such roads prior to the securing and recording of all right of way deeds for the project."

I adhere to that conclusion. However, it is obvious that Section 10, supra, was incorporated in the Farm to Market Road Act of 1943 to make certain that a county had obtained a right of way for a farm to market road from the point of beginning to the point of ending before construction thereon was begun, thus insuring that there would be no interruption or delay in the completion of the road due to difficulty in obtaining the necessary right of way.

Certainly, this section could have no application in the instant situation, for here the road could have been constructed entirely on the existing right of way which the county already had, and the deeds to which have been on file in the office of the judge of probate of the county since 1933, whether an additional right of way five feet in width on each side thereof was obtained or not. As a matter of fact, it was constructed entirely on the existing right of way.

The obtaining of the additional right of way on each side of the existing right of way could not in any way affect the completion of the road; and, as pointed out hereinabove, the obvious purpose of Section

10, supra, was to insure that there would be no interruption or delay in the completion of a road due to difficulty in obtaining the necessary right of way.

The premises considered, you are advised that Section 10, supra, has no application to the instant situation, and that said section does not operate to prevent the State Highway Department from reimbursing the county for work done on such road prior to the time deeds to the additional right of way were filed and recorded in the office of the judge of probate of the county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 7, 1949.

Hon. K. J. Griffith,
Judge of Probate,
Cullman County,
Cullman, Alabama.

1. County Boards of Health have authority to acquire or hold title to real estate.

2. The passage of Act No. 306, General Acts of Alabama 1949, approved July 28, 1949, renders Quarterly Report of Attorney General, Volume 22, page 120, no longer applicable and the same is withdrawn.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of June 25, 1949, is as follows:

"Sometime back I was City Attorney for the City of Cullman, and I was called on for an opinion with reference to the City deeding a lot to the County, or to the County Board of Health for the purpose of erecting a Health Center for this County. My interpretation of the law that I found on this subject, which I did not brief, was that the Board of Health could not own or dispose of real property. This morning it was brought to my attention by Doctor Whiteside our County Health Officer that Etowah County and Gadsden deeded some property, or if I am mistaken in this, the County Board of Health of Etowah acquired property and are letting bids to build a Health Center, therefore, in the right of this information I would like to propound following question to you:

"Can a County Board of Health acquire and dispose of real estate for any purpose under our statute?

"Our Board of Revenue under the sponsorship of County Board of Health has made application to the State and Federal Government under the Hill-Burton act to build a Health Center which is pending. Complications has arisen which makes it imperative that we have the information asked for above as soon as we can get it, and the writer would be especially grateful to you for an immediate opinion on this."

The answer to your question is in the affirmative.

County boards of health are now authorized to hold real estate by virtue of Act No. 306, General Acts of Alabama 1949, approved July 28, 1949, which reads as follows:

"Act No. 306 H. 563—Sullivan

"An Act

"To authorize County Boards of Health to solicit, receive, and hold gifts, devises and bequests of money, real estate, and other things of value to be used in the support, development, and carrying on of their work.

"Be It Enacted by the Legislature of Alabama:

"Section 1. In addition to all other authority now granted them by law, County Boards of Health are hereby authorized to solicit, receive, and hold gifts, devises and bequests of money, real estate, and other things of value to be used in the support, development, and carrying on of their work.

"Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law."

Passage of this Act renders the opinion of this office to the contrary appearing in Quarterly Report of Attorney General, Volume 22, page 120, no longer applicable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 7, 1949.

Hon. Ward W. McFarland,
State Highway Director,
State of Alabama,
CAPITOL.

Highways and Highway Department—Municipal Corporations.

The provisions of Act No. 284, General Acts 1949, approved July 26, 1949, do not serve to relieve railway or other public utility corporations from any responsibility for maintenance, repair, construction or reconstruction of any viaduct, overpass, underpass, or bridges heretofore imposed upon such corporation by agreement or statute.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 4, 1949, is as follows:

"Reference is made to Section 1 of Act No. 284 which was recently passed by the Legislature pertaining to the State Highway Department's assuming the maintenance of certain streets and roads. Section 1 provides as follows:

" 'It is hereby declared by the Legislature of Alabama that city and town streets and roads, or portions thereof, including viaducts and bridges, which constitute the route of connection between or extension of state roads in the Alabama State Highway System, hereby designated as Municipal connecting link roads, have in the past, do now, and will in the future serve a State purpose, and are for the general benefit of the State; that it is a proper and legitimate function of the State to designate such municipal connecting link roads and to provide for the cost and manner and extent of maintenance, repair, construction and reconstruction of the same by the state independently or in cooperation with the city or town involved.'

"There are many highway overpasses that were built by the railroads years ago that are being maintained by the railroads. In other instances where the grade separation structure is an underpass, the State has existing agreements with the railroads providing for the maintenance of them.

"In view of the fact that Section 1 uses the term 'viaducts' under the provisions of this Act, will the railroads be relieved of the responsibility of maintaining such structures and will the burden of maintaining them fall on the Highway Department?"

In my opinion, your inquiry should be answered in the negative.

Reading and construing, as a whole, the provisions of Act No. 284, General Acts 1949, approved July 26, 1949, convinces me that it was the sole intent of the Legislature that under the provisions thereof the State of Alabama, through its Highway Department, assumes certain responsibilities heretofore imposed upon the various municipalities of the State relative to the maintenance, repair, construction or reconstruction, of those roads designated by such act as municipal connecting link roads. The term streets and roads is therein declared to include the bridges and viaducts forming a part thereof.

It is my opinion that it was the intent of Act No. 284, supra, only to relieve the municipalities concerned of the responsibility above mentioned, as it pertains to those roads subsequently designated as municipal connecting link roads, and that it was not the purpose or intent of such act to disturb any agreements existing between the State of Alabama and other parties or corporations, or between any of the municipalities concerned and other parties or corporations. The sole effect of such act, as I see it, was to transfer to the State of Alabama the responsibility for the maintenance, repair, construction and reconstruction of those roads hereafter designated as municipal connecting link roads insofar as such responsibility previously rested upon the municipalities concerned. I find nothing within such act indicating that it was the intent of the framers thereof that any other party, agency or corporation, be relieved of any responsibility in this regard, heretofore or hereafter imposed upon them either by statute or agreement.

I, therefore, advise you that the provisions of Act No. 284, supra, do not serve to relieve any of the public utilities mentioned by you from any responsibility heretofore or hereafter imposed upon such agencies in regard to the maintenance, repair, construction, or reconstruction of viaducts, bridges, overpasses, and the like.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 7, 1949.

Hon. P. C. Black,
Judge of Probate,
Geneva County,
Geneva, Alabama.

Statutes—Constitutional Law.

1. Act No. 344, approved August 9, 1949 (Ms.), is a supplemental act and is not an amendment to Act No. 538, approved September 16, 1939, Local Acts of Alabama 1939, page 329.

2. Act No. 344, supra, does not violate Section 45, Constitution of Alabama 1901.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 3, 1949, is as follows:

"Attached hereto is an official printed and certified copy of Local Act No. 344, S. 555 approved August 9, 1949, relating to increased jurisdiction of the Inferior Court of Geneva County and increased compensation of the Judge of said court. Please advise me upon the following questions:

"1. Does this Act as approved legally authorize me to draw the warrants provided for in Section 4 thereof?

"2. The title of this Act states:

" 'Supplemental to Act No. 538, H. 1009, approved September 16, 1939 (Local Acts of Alabama 1939, page 329), as amended, which establishes the Inferior Court of Geneva County: To increase the jurisdiction of the Court and to increase the compensation of the judge of the Court for the performance of the additional duties resulting therefrom.'

"Is this Act separate and distinct from Act No. 539 referred to in the title, or is it in the nature of an amendment of Act No. 538 referred to in the title? If it is construed as an amendment to Act No. 538, does this Act as approved meet the requirements of the Constitution, especially Section 45 thereof, so as to authorize me as Probate Judge to draw the warrants provided for in Section 4 thereof?

"I will appreciate your official opinion on these questions as early as possible."

I deem it advisable before proceeding to answer your questions to set out the Title and Section 2 of Act No. 344, supra. They are as follows:

"Supplemental to Act No. 538, H. 1009, approved September 16, 1939 (Local Acts of Alabama, 1939, page 329), as amended, which establishes the Inferior Court of Geneva County: To increase the jurisdiction of the Court and to increase the compensation of the judge of the Court for the performance of the additional duties resulting therefrom.

"Section 2. There is hereby conferred on the Inferior Court of Geneva County all of the jurisdiction, powers, authority, and duties

which are conferred on probate courts by Article 3 of Chapter 4 of Title 34 of the Code of Alabama (1940); provided, however, that the provisions of Section 91 of Title 34 of the Code of Alabama of 1940 shall not be applicable to Geneva County and in no event shall Geneva County be liable to any person by reason of any prosecution instituted under Article 3 of Chapter 4 of Title 34 of the Code of Alabama (1940); and, provided further that all fines imposed and collected under the provisions of Section 90 of Title 34 of the Code of Alabama (1940) shall be paid into the general funds of Geneva County for the use of Geneva County."

It is noted from the title of Act No. 344, supra, that it is "Supplemental to Act No. 538, H. 1009, approved September 16, 1939 (Local Acts of Alabama 1939, page 329), as amended." The question, therefore, presented by the title of this Act is whether or not it is in the nature of an amendment to Act No. 538, supra, or is it an independent act.

The Legislature in the case of **Lockhart et al. vs. the City of Troy,** 49 Ala. 579, had occasion to consider an act, the title of which is similar to Act No. 344, supra. In that case the Supreme Court held:

"A supplemental act merely adds something that was left out of the original act. It does not necessarily revise it or amend it in the more technical sense. An amendment is what may be incorporated into the original on its passage. A supplemental act is an independent law; and a healing act is one that cures some defect in a proceeding which the legislature could have authorized in the first instance. In legislation, each form of proceeding has its proper scope, though each may approach the other so nearly as in some degree to mingle into the same form."

See also the case of **State ex rel Gamble v. Hubbard,** 148 Ala. 391, 41 So. 903; Black's Law Dictionary, Third Edition, page 1681; Words and Phrases, Volume 40, Permanent Edition, pages 774 and 775; 59 C. J. page 873, Section 457.

It, therefore, appears from the quotation found in the Lockhart Case that a supplemental act is not necessarily a revision to or an amendment of a former act in the technical sense, and is, therefore, an independent law. This being the case, my answer to your first question is in the negative, that is to say that Act No. 344 is not an amendment to Act No. 539, supra, but is in itself an independent law.

Since I have answered your first question in the negative and hold that Act No. 344 is not an amendment to Act No. 539, supra, it is not necessary that I answer your second question in regard to the constitutionality of this act insofar as Section 45 of the Constitution of 1901 is concerned. However, in view of the wording of Section 2 of Act No. 344, supra, I deem it advisable to state several propositions of law in this regard.

The question could be raised as to whether or not by merely referring to former statutes or existing statutes in Section 2 of said Act without setting them out in full would be a violation of Section 45.

In the case of **State Docks Commission vs. State,** 227 Ala. 251, 150 So. 537, I find the following observation made by the Supreme Court:

> "If the law in itself is complete and intelligible and original in form, it does not fall within the meaning and spirit of Section 45 of the Constitution, although resort in the execution of its provisions must be had through independent sources, including other statutes, or records of commissions or boards."

See also **Phoenix Assurance Co. of London vs. Fire Department of the City of Montgomery,** 117 Ala. 631, 23 So. 843; **State ex rel Bragg vs. Rogers et al.,** 107 Ala. 444, 19 So. 909; **Board of Commissioners of City of Mobile et al v. Moore et al.,** 214 Ala. 525, 108 So. 568.

It, therefore, follows from the above cases that an independent act which is complete and intelligible and original in form does not fall within the meaning of Section 45 of the Constitution, if reference only is made to existing provisions of law without setting such provisions out in full.

Many more cases could be cited on this proposition, but I do not deem it advisable to burden this opinion with additional citations on this point.

You are, therefore, advised that an independent act not mandatory within itself may refer to existing laws without setting the same out in full and not do violence to Section 45 of the Constitution.

In my opinion Act No. 344 is constitutional, and you as Probate Judge of your county are authorized to draw warrants for the payment of the salary of the Judge of the Inferior Court of Geneva County as provided in Section 4 thereof.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 11, 1949.

Hon. Y. K. Lewis,
President, Board of Revenue,
Marengo County,
Linden, Alabama.

Counties.

A county may not contribute its monies for the construction of a swimming pool by a corporation organized under the provisions of Title 10, Section 150, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 16, 1948, is as follows:

> "A swimming pool is being established under the provisions of Title 10, Section 150 of 1940 Alabama Code, which swimming pool will be located in the Town of Linden.
>
> "Under the provisions of Title 12, Section 12 of 1940 Alabama Code, as last amended, may the Board of Revenue of Marengo County, Alabama, legally make a contribution toward the construction of this swimming pool?"

My answer to your question is in the negative.

You state in your request that the swimming pool is being constructed by a corporation formed under the provisions of Title 10, Section 150, Code of Alabama 1940. This section provides that ten or more persons desiring to form a society to promote the development or betterment of a community, municipality, or a county, or for the protection of other public interest, may become incorporated and be entitled to all the powers and privileges of a private corporation.

Section 94 of the Constitution of Alabama 1901 reads as follows:

> "§ 94. The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

It is to be specifically noted that the Legislature is prohibited by the above quoted constitutional provision from authorizing a county to contribute or grant public money or things of value in aid of any corporation whatsoever.

Regardless of the fact that the corporation formed under Section 150, supra, is for the betterment of your community and is formed on a non-profit basis, it is nevertheless under the terms of said section a private corporation. A contribution of public money to this private corporation would be in the very teeth of Section 94 of the Constitution.

You are, therefore, advised that under the provisions of Title 12, Section 12, Code of Alabama 1940, your county may not contribute its funds to this corporation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 11, 1949.

Hon. Festus M. Shamblin,
Tax Assessor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Ad valorem Taxes—Assessment—Board of Equalization—Taxation.

Stock and fixtures which have escaped ad valorem taxation within five years next preceding the current year may be assessed for the years during which this property has escaped taxation. Title 51, Section 53, Code of Alabama 1940.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request bearing date of March 23, 1949 is as follows:

"On March 15, 1949 the Board of Equalization discovered that the Home and Auto Supply Co. had failed to make an Ad Valorem tax return. This company has been in business since 1944, owning nothing but personal property, stock and fixtures.

"Is the Board of Equalization or the Tax Assessor within their legal rights in making up an assessment on their stock and fixtures against this company for 1948, which the Tax Collector is now collecting.

"It is necessary that I have your official opinion on this matter as soon as possible.

"I know we are right on legal rights to make up an assessment for 1949, but I am not sure about 1948."

You will be acting completely within your legal rights, and in accordance with your duty, when you make assessments in the above described situation for the year 1948.

Title 51, Section 21, Code of Alabama 1940, includes fixtures and stock in trade within its subjects of ad valorem taxation. Since the stock and fixtures are fit subjects for ad valorem taxation, Title 51, Section 53, Code of Alabama 1940, is applicable. Section 53 provides that whenever the Tax Assessor discovers that any property has escaped taxation in any assessment within five years next preceding the current year, "he shall list, return and value said property for assessment for the years during which the same has escaped taxation, and shall also endorse on such returns the year or years for which the property has escaped taxation, and the accrual of a penalty of ten percent of the taxes assessed thereon for each year."

Section 53, supra, is a complete answer to the question raised by your request. See also: Quarterly Report of Attorney General, Vol. 20, page 28, and Quarterly Report of Attorney General, Vol. 27, page 114.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

October 25, 1949.

Hon. Phillip J. Hamm,
Commissioner of Revenue,
State of Alabama,
CAPITOL.

Gasoline—Refunds—Taxation—Tax Assessors.

The tax assessor has authority to administer the oath required by Section 4 of Act No. 323, General Acts 1949 (Ms.), approved August 2, 1949, upon the registration of a tractor for the gasoline tax refund provided for in said act.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of September 23, 1949, is as follows:

"Reference is made to Act 323 as passed by the Regular Session of the 1949 Legislature, a copy of such Act is enclosed for your convenience. Particular reference is made to Section 4 of said Act wherein it is required that a tractor owner shall register his tractor with the Tax Assessor and that the registration shall be under oath and that no fee for registration shall be charged.

"Your opinion is requested (1) as to whether or not a Tax Assessor has the authority under the general law to administer the oath contemplated in this Act, and (2) whether or not this Act itself gives the Tax Assessor authority to administer the required oath.

"These tractors are presently being registered with the Tax Assessors of the various counties and this Department has received some several registrations upon which it is shown that the Tax Assessor administered the oath.

"Your early opinion is respectfully requested inasmuch as some 30 to 40 thousand tractors will be registered within the next few weeks. In answer to your first inquiry, it is my opinion that the tax assessor

does not have authority under the general law to administer the oath required by Act No. 323, General Acts, 1949 (Ms.), approved August 2, 1949.

The tax assessor or his deputy is authorized to administer the oath required of persons making returns of their property for taxation. Title 51, Sections 39 and 40, Code of Alabama 1940. However, it is my conclusion that these sections do not authorize the tax assessor or his deputy to administer the oath required by Act No. 323, supra, upon the registration of a tractor for the purpose of obtaining the gasoline tax refund provided for in said act. Such registration is not made for the purpose of assessing the tractor for taxation.

Section 8 of Act No. 323, supra, provides that the Commissioner of Revenue "and his specially authorized representatives shall have the power to administer oaths, take depositions, and issue subpoenas to compel the attendance of witnesses and production of papers, books, or documents necessary as evidence in connection with this Act." It is my conclusion that, as under the provisions of Section 4 of said act, the person desiring the refund must register the tractor with the tax assessor on forms furnished for such purpose by the State Department of Revenue, the tax assessor is a "specially authorized representative" of the Commissioner of Revenue within the meaning of such term as used in Section 8, supra.

Answering your second inquiry, it is, therefore, my opinion that the tax assessor has authority to administer the oath required by Section 4 of Act No. 323, supra, upon the registration of a tractor for the gasoline tax refund provided for in said act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 25, 1949.

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Ad Valorem Taxes—Liens—Taxation—Tax Collector.

When a person owing taxes in County A sells personal property which has become assessable, and the purchaser of this property moves the property into County B, the Tax Collector of County A may cause a bill operating as a writ of fieri facias to issue; and the Tax Collector of County B may execute the writ. Title 51, Section 219, Code of Alabama 1940.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of May 24, 1949, is as follows:

"For the tax year 1948, Palmer Mills Inc. assessed certain parcels of real estate in this County, and under a separate assessment assessed personal property. During the tax year said corporation went out of business and sold their realty holdings on which taxes for 1948 were paid. Said corporation also sold its personal property consisting of office furniture, fixtures, machinery and etc., and stock of supplies of manufactured articles. Part of said personal property was shipped out of the State, but part of it was shipped into an adjoining county by the purchaser thereof.

"Section 219, Title 51 of the 1940 Code, sets out the procedure to be followed in obtaining a fieri facias to be sent to the Tax Collector for execution in the county in which the 'tax payer has removed the property.' The attorney for the tax payer raised the point that the tax payer in question has not moved into another county and that Section 219 does not apply in such cases where the purchaser of personal property has moved same into another county. Said attorney contends that a levy on a fieri facias issued in compliance of said Section 219 would be illegal in this particular case.

"For my official protection, please give me your legal opinion as to whether or not I would be acting in legal bounds and in line and scope with my duties as Tax Collector to cause such fieri facias to be issued. Also give me your opinion as to whether or not the Tax Collector in the county in which the personal property is now located would be legally authorized to make levy and sell said personal property as provided for in said Section 219.

"If your opinion is a negative one, please give me your opinion as to whether or not I could legally enforce a collection of the taxes on the Personal Property by sale of real estate originally assessed to the tax payer, which since being assessed has been sold by said tax payer.

"If your opinion is in the affirmative, would not the regular procedure prescribed by statute be the legal means to follow in making such sale.

"There is more than $5,000 in taxes involved in this matter and I would therefore appreciate your opinion at an early date."

It is proper for you, as Tax Collector of Jefferson County, to cause a bill operating as a writ of fieri facias to issue; and, it is equally proper for the Tax Collector in the adjoining county, in which the personal

property is located, to execute the writ as provided in Title 51, Section 219, Code of Alabama 1940. Since these questions are answered affirmatively, according to your request you do not desire answers to your other questions.

In order to understand the proper field of operation of Section 219, supra, one must first understand the operation of the lien provisions of the taxing statute. Title 51, Section 884, Code of Alabama 1940, provides:

> "From and after the first day of October of each year, when property becomes assessable the state shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him and upon each piece and parcel of property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it; and if such property is within the limits of a municipal corporation such municipal corporation shall have a like lien thereon for the payment of the taxes which may be assessed by it. These liens shall be superior to all other liens and shall exist in the order named and each of such liens may be enforced and foreclosed by sale for taxes as provided in this title, or as other liens upon property are enforced, except as otherwise provided by law."

Under Section 884, supra, the State has a lien which is good against subsequent mortgages and purchasers of real or personal property owned by the taxpayer as of October 1 of the year when the tax became assessable. These subsequent purchasers of personal property or real property from the taxpayer are chargeable with knowledge that the tax lien in favor of the state or county exists. The lien follows the property, is continuously valid as against that property, and is superior to any interest of any subsequent purchaser. See: **U. S. v. Alabama,** 313 U. S. 274, 85 L. Ed. 1327; Quarterly Report of Attorney General, Vol. 31, page 5; Quarterly Report of Attorney General, Vol. 22, page 244. See also: **Driggers v.** Cassaday, 71 Ala. 529; **State v. Alabama Educational Foundation,** 231 Ala. 11, 163 So. 527. The tax lien continues against such property until the taxes are paid.

A lien is a security device. It enables the state to realize funds, which a taxpayer has not paid, by selling property owned by the taxpayer, or by selling property sold by the taxpayer subsequent to the key date as provided in Section 884, supra. Hence, when taxes have not been paid, the State is interested in the property against which it may realize the amounts owed to the State by way of taxes.

In the light of the foregoing discussion, the proper construction of Title 51, Section 219, supra, becomes evident. It is true that the first clause of Section 219 speaks of a situation where "any person owing taxes in his county . . . has left the county . . ." However, we must read

the opening clause in conjunction with the subsequent provisions of Section 219. These latter provisions allow the writ of fieri facias to be forwarded to "the collector of any county in which the taxpayer has any property"; and the collector of such other county may proceed to execute this writ after having complied with the other requirements of Section 219.

The emphasis of Section 219 is upon the property. Indeed, when the statute says "any county in which the taxpayer has any property," the true meaning of that clause is any county in which there is any property which can be sold to realize taxes owed by the original taxpayer. It would be ridiculous to assert that, even though subsequent purchasers from the taxpayer cannot escape the effects of the tax lien, Section 219 has no field of operation as to those subsequent purchasers. The property is the crucial thing, and it is my opinion that Section 219 is directed to the property and not to a particular person. "Taxpayer" must be equated with "subsequent purchaser," since the subsequent purchaser stands in the shoes of the taxpayer so far as the tax lien is concerned.

To reiterate, you may cause the write of fieri facias to be issued, and the Tax Collector in the county in which the personal property is now located may execute the writ according to the provisions of Title 51, Section 219, supra.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

October 25, 1949.

Hon. Graf Hart,
Tax Assessor,
Cullman County,
Cullman, Alabama.

Ad Valorem Taxes Exemption—Exemptions—Taxation.

Elks Lodge is not exempt from ad valorem taxation.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of August 22, 1949, is as follows:

"I would like to get your opinion on a matter which has come up recently.

"Following the examiners investigation of our books, they have charged me with taxes they claim are due on the Cullman B. P. O. E.

Lodge, which I had exempted for 1949 taxes. I made this exemption on the basis that they are a fraternal and charitable organization and they own their own home and rent out no property from which they derive rent.

"Mr. McDermont and Mr. Bain, the State Examiners, will be leaving here this week, so I would appreciate it if you would give this your immediate attention."

The property owned by the Elks of Cullman and used as a lodge is not exempt from ad valorem taxation.

Title 51, Section 2, Code of Alabama 1940, allows exemption for real and personal property "used **exclusively** for religious worship, for schools or for purposes **purely** charitable." (Emphasis supplied). The Elks Lodge is not used "exclusively" for charitable purposes, nor is it used "for purposes **purely** charitable." Therefore, the lodge does not come within the charitable exemptions section of Title 51, Section 2, supra.

A leading case on the subject is **B. P. O. E. Lodge No. 511 v. City of Houston,** ——— Tex. Civ. App. ———, 44 S. W. 2d 488, which holds that the Elks Lodge is not exempt from taxation as a "purely public charity" since the Elks had other features for the entertainment and recreation of its members. Other cases to the same effect are annotated in 22 A. L. R. 907, 916; 83 A. L. R. 773, 780.

To reiterate, the Elks Lodge in question is not exempt from ad valorem taxation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 27, 1949.

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Judges of Probate—Licenses.

A probate judge may accept payment for a one-half year business license on or before April 1.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of September 27, 1949, is as follows:

"It is my wish to ascertain your opinion as to whether or not I am liable for issuing a license dated April 1 upon the payment to me of one-half of the year's license or privilege tax to carry on the business."

Your question is, "Can a probate judge accept payment for a one-half year business license on or before April 1."

I can find nothing to prevent the probate judge from doing so. Title 51, Section 850, reads, in pertinent part, as follows:

"§ 850. License for part of year; amount of tax.—Unless otherwise provided, if any business licensed by this title shall commence after the first day of April in any year, the amount of the license or privilege tax shall be one-half of the year's license or privilege tax. In all other cases the license taken out for the full term of one year, unless a shorter term is fixed by the provisions of this title. * * * * *"

By the provisions of Title 51, Section 450 and Section 831, as amended by Act No. 546, General Acts of Alabama 1943, page 535, approved July 15, 1943, business licenses must be purchased before the firm opens for business. Quarterly Report of Attorney General, Volume 1, page 299. Therefore, if the firm intended to open on April 2, they would have to purchase the license prior thereto. This office has held that it is the duty of the judge of probate to issue to a person who applies for a license, the license for which he applies, upon payment by such person of the proper amount for such license. Quarterly Report of Attorney General, Volume 20, page 301.

"It is further my opinion that it is incumbent upon the judge of probate to issue him a license for the next succeeding license year upon his making application therefor and upon the payment of the proper amount for the same irrespective of whether he applies for and purchases the appropriate license for the then remaining portion of the then current license year. There is no duty devolving upon the judge of probate to require such a person to purchase the appropriate license for the then remaining portion of the then current license year before issuing him a license for the next succeeding license year upon his application therefor and the tender of the proper amount for such license." Quarterly Report of Attorney General, Volume 20, page 303.

Of course, this license does not give the purchaser the right to engage in business before the second of April. If he does, he violates the law and is subject to the penalty imposed. At this point, it might be well to point out that it is the duty of the license inspector, and not the judge of probate, to see to it that a person who engages in a business for which a license is required has the appropriate license therefor. Quarterly Report of Attorney General, Volume 20, page 301; Quarterly Report of Attorney General, Volume 23, page 91.

The judge of probate should clearly indicate on the license "the time for which it is issued" in order to comply with the provisions of Section 450, supra, and Section 831, as amended, supra.

In construing an analogous situation, this office has held that a judge of probate may issue hunting and fishing licenses before the beginning of the license year. Quarterly Report of Attorney General, Volume 25, page 187.

I, therefore, conclude that a probate judge may accept payment for a one-half year business license on or before April 1.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 25, 1949.

Hon. James S. Saliba,
Brigadier General,
The Adjutant General,
State Military Department,
CAPITOL.

Taxation—Exemptions—National Guard.

1. Post exchanges or canteens, owned, operated and run exclusively by National Guard Units are exempt from the payment of state, county, city or town licenses or taxes; and are exempt from the payment of gasoline and tobacco taxes to state, county, city or town, when operated in accordance with rules and regulations promulgated by the Adjutant General and approved by the Governor. Title 35, Section 110, Code of Alabama 1940.

2. Such post exchanges and canteens are exempt from the special Mobile County cigarette tax levied pursuant to Act No. 413, General Acts 1943, page 378, approved July 8, 1943.

3. Title 35, Section 110, Code of Alabama 1940, exempts the **post exchanges** and **canteens** operated exclusively by National Guard Units from the payment of the licenses and taxes enumerated therein.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of August 4, 1948, is as follows:

"Reference is made to your opinion dated May 12, 1948 to the Hon. J. A. Stephens, then Commissioner of Revenue, State Department of Revenue, with reference to the above cited code provision and its effect upon attempts to collect state gasoline and tobacco taxes in connection with sales thereof by National Guard exchanges and canteens. It is noted that your opinion was confined to the exemptions afforded by this code provision against collection of state taxes.

"It has now come to my attention that an agency of Mobile County and the City of Mobile insist that National Guard post exchanges and canteens being operated within their territorial jurisdictions are not exempted from a county school tax and a municipal gasoline tax, and it appears that a further ruling from you will be necessary to settle these questions.

"Attorneys for the Board of School Commissioners of Mobile County (the County Board of Education in that County), after consideration of your opinion of May 12, 1948, are still of the opinion that National Guard post exchanges and canteens are not exempt from a 'Special Mobile County Cigarette Tax' levied pursuant to the Act of July 8, 1943 (General Acts 1943, page 378). It appears that these attorneys base their reasoning on the fact the tax statute in question was enacted during the 1943 session, subsequent to the enactment of the code provision in question, and without any reference to the special National Guard exemption statute in the section of the 1943 act dealing with exemptions under the new tax. It appears that these attorneys for the school board, Messrs. Pillans, Reams, Tappan and Wood, have had some correspondence with you on this subject; however, I am attaching a copy of what purports to be a letter from them to you on this subject dated July 26, 1948, a copy of which letter has been furnished me by the local National Guard commander concerned in this dispute.

"A local National Guard commander in Mobile has also advised me that the City of Mobile, pursuant to an opinion of its attorney, contends that a city gasoline tax must be collected despite the provisions of Title 35, Section 110, Code of Alabama 1940. It appears that the City Attorney's contention is that the liability for payment of the city gasoline tax is on the purchaser (National Guard member) rather than upon the seller (the post exchange or canteen), and that the above code provision merely exempts the post exchange or canteen, as seller, but does not exempt the member where the city tax ordinance imposes the tax liability upon the purchaser rather than upon the seller.

"In view of the above disputes which have already arisen and such others as may reasonably be anticipated, it will be appreciated if you will advise me as to the following questions in connection with the application of Title 35, Section 110, Code of Alabama 1940:

"(1) Does said code provision exempt National Guard Post Exchanges and Canteens from all licenses and taxes (including gaso-

line and tobacco taxes) imposed by counties, cities and towns and agencies thereof?

"(2) Does said code provision afford an exemption from the Special Mobile County Cigarette Tax levied pursuant to the Act of July 8, 1943 (General Act of 1943, page 378)?

"(3) Both with reference to the above mentioned Act of July 8, 1943, and as a general proposition, does the exemption provided by subject code provision inure to the National Guard member making a purchase from a National Guard post exchange or canteen, where the state, county or city tax or license statute or ordinance attempts to impose the tax liability on the purchaser rather than the seller?"

The opinion which you request can be answered almost completely by reference to Title 35, Section 110, Code of Alabama 1940, and to Quarterly Report of Attorney General, Vol. 41, page 96. Since you refer to this opinion of the Attorney General in your request, I know that you are familiar with the opinion. I shall proceed to answer your questions separately and in the order in which you ask them.

I.

Your first question is answerable by reference to Title 35, Section 110, supra. This section states that all post exchanges or canteens "owned, operated and run exclusively by National Guard Units" shall be exempt from the payment of "all" state, county, city or town licenses or taxes; such post exchanges and canteens shall also be exempt from "payment of tobacco and gasoline tax to state, county, city or town when operated in accordance with rules and regulations as the Adjutant General may provide and the Governor may provide, when the profits of such canteens or exchanges to the National Guard or National Militia Units and not to the operators of such enterprises."

It is not clear what you mean by "agencies thereof" in your opinion. Such a term could not be given very broad meaning, since the exemption statutes are narrowly construed. But the code section involved clearly exempts post exchanges and canteens of the National Guard from all county, city and town licenses and taxes within the conditions and limitations imposed by that code section.

II.

Your second question is affirmatively answered. Act No. 413, General Acts 1943, page 378, approved July 8, 1943, is not without the exemption of Title 35, Section 110, supra. The argument which you raise in your request was precisely considered in Quarterly Report of Attorney General, Vol. 51, page 96 (the opinion to which your request refers), and was rejected in that opinion. This opinion reads at page 101:

"The intent of the Legislature to grant the exemptions set forth in Section 110, supra, is not, in my judgment, refuted by the presence

in Title 51, Section 647, Code of Alabama 1940, as amended by the Legislature in 1945 (General Acts 1945, page 591, approved July 6, 1945) of certain specific exemptions without including an exemption as to post exchanges or canteens. It might be said that the Legislature took cognizance of the exemptions already in the Code and saw no need of again writing it into law. In my judgment the rule inclusio unius est exclusio alterius—the inclusion of one is the exclusion of the other—does not have application in this case. This maxim expresses a rule of statutory construction and serves only as an aid in discovering legislative intent where such intent is not otherwise manifest. (Citation)"

Therefore, there is an exemption from the special Mobile County cigarette tax levied pursuant to the above Act of July 8, 1943.

III.

Your third question is extremely broad and extremely hypothetical. It is impossible to answer this question precisely without having a particular statute or ordinance before me. However, Title 35, Section 110, supra, exempts post exchanges and canteens from the payment of licenses and taxes. Only the exchanges and canteens are exempt from such payment. We must remember that exemptions in taxing statutes are strictly construed against the taxpayer.

This is all that one can say generally on the subject of your third question. A specific answer would have to be directed to a specific statute or ordinance.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

W & master

November 1, 1949.

Hon. Frank Marion Orr,
Chairman, Board for Registration of Architects,
229 Woodfield Drive,
Auburn, Alabama.

Architects.

1. The practice of architecture requiring registration under Title 46, Section 9, Code of Alabama 1940, as amended by Act No. 226, General Acts 1943, page 191, does not include persons making plans for and supervising the construction of their own buildings.

2. The requirement set forth in Title 46, Section 17, Code of Alabama 1940, that each registered architect must obtain a

seal does not mean that it is necessary to use a seal making a mechanical imprint, and the type and design of said seal may be prescribed at the discretion of the Board for the Registration of Architects.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of October 24, 1949, is as follows:

"From time to time the State Board for Registration of Architects is confronted with reports of alleged violations of the Registration Act, and quite often the members of the Board are not certain of the correct procedure, therefore, as Chairman of the Registration Board I should like to solicit your opinion upon the following points relating to the Registration Act:

"1. Section 9 of the Registration Act says in part: 'any person who shall be engaged in the planning or design for the erection, enlargement or alteration of any building or buildings for others, or furnishing architectural supervision of the construction thereof shall be deemed to be practicing architecture.' Question: In the definition of the practice of architecture there is used the words 'for others.' Does this mean that any person may prepare plans and supervise the construction of his own building, provided the building meets the requirements of all building laws?

"2. Section 17 of the Registration Act requires that each registered architect obtain a seal of the design authorized by the Board and that plans, specifications, prints and reports issued by the registrants be stamped with said seal during the life of the registrant's certificate. Question: Does the word seal mean a mechanically imprinted seal or may a registrant produce such seal on the original drawing with the result that all copies (blue prints, etc.) will have a facsimile reproduction of the seal?

"It is with extreme apology that I burden you with these questions at this time since I know you must be extremely busy, however, the Registration Board holds its regular meeting at Auburn on October 28, and I believe that your opinion in regard to the above points will be most helpful."

Your first question is answered in the affirmative.

Title 46, Section 8, Code of Alabama 1940, as amended by Act No. 226, General Acts 1943, page 191, holds in pertinent part that no person shall practice architecture within the State unless he shall be registered with the Board for Registration of Architects. The stated purpose of such registration is to safeguard life, health, and property.

Following Section 8, supra, Title 46, Section 9, Code of Alabama 1940, as amended by Act No. 226, General Acts 1943, page 191, outlines what is not considered the practice of architecture requiring registration. Included within the scope of this are various employees of lawfully registered architects working directly under their supervision. Also not required to register are those individuals making plans and specifications for or supervising the erection, etc., of (a) any building on a farm for the use of a farmer, (b) any one or two family residences costing less than $10,000.00, or any appurtenances thereto costing less than $10,000.00, or (c) any type building costing less than $10,000.00 (except buildings intended for mass assemblage of people). In addition, engineers not required to register as architects are those registered engineers performing architectural services incidental to their engineering practice. Section 9, supra, then reads in pertinent part as follows:

> "Otherwise any person who shall be engaged in the planning or design for the erection, enlargement or alteration of any building or buildings **for others**, or furnishing architectural supervision of the construction thereof shall be deemed to be practicing architecture * *" (Emphasis supplied.)

Reviewing all legislation on the subject, it is apparent that specific reference to those individuals making plans for and supervising the construction of their own buildings is not made. Section 9, as noted above, appears clear in all aspects with the exception of registration not being required where construction involves (b) any one or two family residences costing less than $10,000.00, or any appurtenances thereto costing less than $10,000.00, and (c) any type building costing less than $10,000.00, where, in both instances, no reference is made to such work being done "for others." This raises the question of whether or not the Legislature, in requiring registration as an architect before such buildings exceeding a cost of $10,000.00 can be constructed, also intended the applicability of same to individuals constructing their own buildings when the costs exceed $10,000.00.

Laying aside any consideration of the constitutionality of such legislative interpretation, it is my opinion that such was not the legislative intent, and that proper statutory construction calls for an interpretation wherein the restrictions noted apply only to such work being done "for others." The phraseology, commented upon, to-wit, "Otherwise any person who shall be engaged in the planning or design for the erection, enlargement or alteration of any building or buildings for others, or furnishing architectural supervision of the construction thereof shall be deemed to be practicing architecture," must be construed as directed to the preceding portions of the statute, and fortifies the conception of legislative intent I have taken.

"There can be no fair or just construction or interpretation, if it be limited to particular words or phrases, or the words or phrases of particular clauses. The whole must be considered, to ascertain the sense and significance, in which words or phrases are used in particular parts

of clauses." **State, ex rel. Winter vs. Sayre,** 118 Ala. 1, 28; 24 So. 89.

In answer to question 2 posed by your inquiry, it is my opinion that the Legislature, in requiring each registered architect to obtain a seal, did not have in mind that such seal must of necessity make a mechanical imprint. Title 46, Section 17, Code of Alabama 1940, reads in pertinent part as follows:

> "Each registrant hereunder must upon registration obtain a seal **of the design authorized by the board,** bearing the registrant's name and the legend 'Registered Architect.' " (Emphasis supplied.)

From a reading of the above, it is clear that the seal required can be of any design authorized by the Board so long as it bears the registrant's name and the legend, "Registered Architect." This can be a mechanical imprint seal or otherwise, in the discretion of the Board, and you are so advised.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

November 2, 1949.

Hon. A. B. Jefferies,
Chairman, Board of Revenue,
Mobile County,
Mobile, Alabama.

Constitutionality—Statutes—Boards of Equalization—Mobile County.

1. Act No. 399, General Acts 1949 (Ms.), approved August 16, 1949, which further amended Title 51, Section 94, Code of Alabama 1940, as the same had been previously amended, became effective immediately in Mobile County, there being no constitutional barrier to its immediate application in such county.

2. Under Title 51, Section 94, Code of Alabama 1940, as last amended by Act No. 399, supra, members of the Board of Equalization of Mobile County serve on a full-time basis and are paid at the rate of thirty-six hundred dollars per annum, payable in equal monthly installments.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of September 21, 1949, is as follows:

"Your official opinion is hereby requested by and for the information and guidance of the Board of Revenue and Road Commissioners of Mobile County on the following important public questions, viz:

"What is the present legal effect of General Act No. 399 of the Legislature of Alabama of 1949 as approved by the Governor on August 16, 1949, amending Section 94 of Title 51 of the Code of Alabama of 1940 as last amended in 1947 relating to the term of service and compensation of members of the Board of Equalization of Mobile County; also, whether or not the members of such Board of Equalization may now legally claim and be paid by our county governing body the additional salary there provided by working on a full time basis?

"In answering these questions, you may assume as a fact that the 1948 Tax Assessor's abstract of assessed property valuations in Mobile County was in excess of one hundred million dollars and less than three hundred million dollars, being within subdivision (2) of said act.

"As the undersigned had requested from our County Attorney an advisory opinion previously on this matter and before any notice was given this Board that the members of our Board of Equalization would claim such additional compensation, I am sending to you herewith a copy of such advisory opinion for your information."

Under Title 51, Section 94, Code of Alabama 1940, as amended by Act No. 560, General Acts 1947, page 395 (the last amendment to said section prior to 1949), the annual term of service and compensation of members of the several county boards of equalization were determined by the total assessed value of all taxable property in the county, with the value for the year 1944 being used as a basis. According to information furnished me by the Commissioner of Revenue, the total assessed value of all taxable property in Mobile County in the year 1944 was $99,072,273. Consequently, the following provision of said section, as amended, supra, governed the annual term of service and compensation of the members of the Board of Equalization of Mobile County:

"(3) In those counties in which the total assessed value of all taxable property is not less than fifty million dollars ($50,000,000) and does not exceed one hundred million dollars ($100,000,000), according to the tax assessor's abstract of assessments for said year, the members of the county board of equalization shall serve for not more tahn six (6) months, the exact working period to be fixed or approved by the department of revenue, and shall be paid at the rate of two hundred and fifty dollars ($250) for each month; and said board shall be allowed annual traveling expenses, to be approved by the department of revenue, not to exceed the sum of two hundred fifty dollars ($250) for any tax year."

Thus, under said section, as amended, supra, the members of the Board of Equalization of Mobile County served for not more than six months in each year, the exact working period being fixed and approved by the Department of Revenue, were paid at the rate of two hundred and fifty dollars per month, and were allowed annual traveling expenses, to be approved by the Department of Revenue, not exceeding two hundred and fifty dollars.

Title 51, Section 94, Code of Alabama 1940, was again amended by Act No. 399, General Acts 1949 (Ms.), approved August 16, 1949, to change the year to be used as a basis for determining the annual term of service and compensation of members of the boards of equalization of the several counties of the State from 1944 to 1948. (This is the only change which was made in said section by said amendment that is material to the question here under consideration.) According to information furnished to me by the Commissioner of Revenue, the total assessed value of all taxable property in Mobile County in the year 1948 was $128,250,287. Consequently, the following provision of said section, as last amended, supra, now governs the annual term of service and compensation of the members of the Board of Equalization of Mobile County, if said act became effective immediately in said county:

> "(2) In those counties in which the total assessed value of all taxable property is not less than one hundred million dollars ($100,000,000) and does not exceed three hundred million dollars ($300,000,000), according to the tax assessor's abstract of assessments for said year the members of the county board of equalization shall serve on a full time basis and shall be paid at the rate of thirty-six hundred dollars ($3,600) each per annum, payable in monthly installments;"

Under this provision, the members of the Board of Equalization of Mobile County would serve on a full-time basis and would be paid at the rate of thirty-six hundred dollars each per annum.

It has been suggested that, inasmuch as the effect of the above quoted provision of Section 94, as last amended, supra, is to increase the compensation of the members of the Board of Equalization of Mobile County, said provision cannot constitutionally and legally apply in said county during the present term of the present members of said board, because of the provisions of Constitution of Alabama 1901, Sections 68 and 281. Section 68, supra, reads, in pertinent part:

> "The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer ,servant, or employe, agent, or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; * * *"

Section 231, supra, reads:

> "The salary, fees, or compensation of any officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

It has long been the settled law of this State that, for new and additional duties, an incumbent of a public office may be awarded extra compensation without a violation of constitutional provisions forbidding an increase in compensation during his term of office. The leading case on this question is **Tayloe v. Davis,** 212 Ala. 282, 102 So. 433, decided by the Supreme Court of Alabama in 1924, and widely cited and quoted from with approval by the courts of this and other jurisdictions, as well as by leading text writers and reference works. The question before the court for decision in that case was whether or not the then Attorney General was constitutionally and legally entitled to additional compensation, during his then term of office, for new and additional duties placed upon him, under an act providing therefor. The court, in holding that he had the constitutional and legal right to receive such extra compensation, spoke as follows:

> "It has now been long declared by this court that for new and additional duties an incumbent of a public office may be awarded extra compensation without a violation of section 118 or 281, forbidding an increase of salary during the term. It may be said a rule of legislative policy has grown up by the sanction of this court's construction of these sections.
>
> "We think there is no need to review the ground of these decisions. We may say that while a public officer takes his office cum onere, and is required to perform the duties from time to time prescribed by law, there is inherent justice in granting compensation for the increased labor and responsibility imposed by new legislation. The just legislator may be rather disposed to create a new office, than to impose unexpected new burdens on an existing officer without compensation. Nor do we think any sound objection obtains to conferring new duties, with compensatoin, upon the officer who, by reason of knowledge and experience, is best fitted to the new task. Fitness for the new duties growing out of experience in former official labors may furnish the opportunity to get efficient service at minimum expense to the State."

For some of the later decisions of the Supreme Court of Alabama which cite the Tayloe case with approval on this question, see **McElderry v. Abercrombie,** 213 Ala. 289, 104 So. 671; **State ex rel. Ward v. Henry,** 224 Ala. 224, 139 So. 278; **Dillon v. Hamilton,** 230 Ala. 310, 160 So. 708; **Morgan County v. Edmonson,** 238 Ala. 522, 192 So. 274; and **Marion County v. Middleton,** 246 Ala. 464, 21 So. 2d 312.

In some jurisdictions, it is held that a public official may constitutionally and legally receive extra compensation for new and additional duties imposed upon him, notwithstanding constitutional provisions such as ours, cited supra, only if the new and additional duties imposed are not germane to his office; but that rule does not obtain in this jurisdiction. See **Morgan County v. Edmonson**, supra.

So, if Act No. 399, supra, had the effect of so amending Title 51, Sectin 94, Code of Alabama 1940, as previously amended, as to impose new and additional duties on the present members of the Board of Equalization of Mobile County, then, there is no constitutional or legal barrier to said members receiving the extra compensation provided thereby. Under the governing statutory provision prior to Act No. 399, supra, the members of the Board of Equalization of Mobile County only served for not more than six months in each year, the exact working period being fixed and approved by the Department of Revenue; whereas, under the governing provision of Act No. 399, supra, if the same was immediately effective in Mobile County, the members of said board now serve on a full-time basis.

Does the requirement that a public official serve on a full-time basis, rather than for not more than six months each year, place a new and additional duty on such official? If it does, then Act No. 399, supra, was immediately effective in Mobile County, and the members of the Board of Equalization of said county are now required to serve on a full-time basis and are entitled to be paid at the rate of thirty-six hundred dollars per year. If it does not, then Act No. 399, supra, was not immediately effective in Mobile County, and the members of the Board of Equalization of said county still serve only for not more than six months each year and shall be paid at the rate of two hundred and fifty dollars per month. I think it does. While it may be conceded that the authority and power of the Board of Equalization of Mobile County in regard to inspecting, revising, and fixing the value of all the property returned to or listed with the tax assessor for taxation, etc., are the same under Title 51, Section 94, Code of Alabama 1940, as amended by Act No. 399, supra, as they were prior to the passage of said act, yet I am clear to the conclusion that the requirement that the members of said board devote at least six months more out of each year to the discharge of that authority and power than they were required to devote prior to its passage constitutes a bona fide new and additional duty. Certain it is that such a requirement places "increased labor" on such members and imposes "unexpected new burdens" on them. See **Tayloe v. Davis**, supra.

In reaching this conclusion, I have not overlooked the opinion of the learned Attorney for Mobile County, a copy of which you have furnished me, in which he concluded that Act No. 399, supra, was not immediately effective in Mobile County, and that the members of the Board of Equalization of said county are not entitled to the extra compensation provided thereby during their present term of office. However, his conclusion seems to be rested solely on the fact that, under said act, the authority and power of the members of the Board of Equalization of

Mobile County in regard to inspecting, reviewing, revising, and fixing the value of all the property returned to or listed with the tax assessor for taxation, etc., were not changed but remained the same, which fact I do not deem to be controlling, as you can see from what I have said above.

The premises considered, you are advised:

1. Act No. 399, supra, became effective immediately in Mobile County, there being no constitutional barrier to its immediate application in such county.

2. Under Title 51, Section 94, Code of Alabaam 1940, as last amended by Act No. 399, supra, members of the Board of Equalization of Mobile County serve on a full-time basis and are paid at the rate of thirty-six hundred dollars per annum, payable in equal monthly installments.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

November 10, 1949.

Hon. John Brandon,
State Treasurer,
CAPITOL.

Corporations—Insurance—State Treasurer.

When the State Treasurer, by decree of a Circuit Court in Equity, is ordered to turn over assets of a dissolved corporation to the receiver appointed by the Court, he has no discretion in the matter, but should obey the mandate of the Court.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of August 23, 1949, is as follows:

"I am transmitting herewith a copy of a certified Interlocutory Decree issued by the Circuit Court of Lee County, Alabama, in Equity, in the matter of C. A. Walwyn, as Trustee, vs. Hospital Care Corporation, a corporation, et al., dated June 17, 1949, and also a copy of a certified Supplementary Interlocutory Decree, dated August 12, 1949, together with letters directed to this office by W. O. Brownfield, Clerk of the Circuit Court of Lee County and Register in Chancery, and our reply pertaining thereto.

"You are requested to advise this office whether or not the securities being held by the undersigned in accordance with provisions contained in Article 3, Title 28, Code of Alabama 1940, may be released in accordance with the decrees referred to."

In my opinion, your inquiry should be answered in the affirmative. The Interlocutory Decree and the Supplementary Interlocutory Decree, provide, respectively, as follows:

"This cause being heard before the Court on oral testimony of the witnesses, and being submitted upon the petition, upon decree pro confesso, and evidence, the Court is satisfied that the allegations contained in the petition are true.

"It is therefore considered, ordered and decreed by the Court that the said Hospital Care Corporation, an Alabama Corporation, be and is hereby dissolved.

"It is further ordered, adjudged and decreed by the Court that W. O. Brownfield, Register in Chancery of Lee County, Alabama, be and he is hereby appointed as receiver for the said Hospital Care Corporation for the purpose of obtaining from the Treasurer of the State of Alabama the assets of said Hospital Care Corporation, being U. S. Treasury bonds U. S. Treas. 2½ coupon 11/15/72-67 $2,000 and Alabama Bridge Finance Corp. 1½ coupon 1/1/50 $3,000.00 together with interest on said bonds to be held by the said W. O. Brownfield for the payment of all claims and debts against the said Hospital Care Corporation, including the costs of these proceedings.

"It is further ordered, adjudged and decreed that the said W. O. Brownfield as such receiver shall notify any creditors of the dissolution of the said Hospital Care Corporation by advertisement once a week for four successive weeks in the Opelika Daily News, a newspaper published in Lee County, Alabama, and require all claims against said Hospital Care Corporation to be presented in this Court by July 26, 1949, or the same will be barred; and the said W. O. Brownfield is to make due report to this Court of all monies received and claims filed in this matter.

"It is further ordered, adjudged and decreed that claims already filed in this Court shall not be required to be filed again and shall be considered by the Court at the time the report is made by the receiver as required by the terms of this decree.

"Done at Opelika this 17th day of June, 1949.

"(Signed) Albert Hooton
JUDGE"

* * * * * *

"This matter having been heard before the Court on this day on supplementary testimony as noted by the Register, and upon the

examination of the testimony, the Court is satisfied that there are no policy holders of the Hospital Care Corporation having any claim against said corporation, and that there are no unpaid claims pending due any policy holder;

"IT IS THEREFORE considered, ordered, adjudged and decreed that the Treasurer of the State of Alabama deliver to W. O. Brownfield, Register in Chancery of Lee County, Alabama, who is acting as Receiver for said Hospital Care Corporation the bonds now on deposit to the credit of the Hospital Care Corporation, being U. S. Treas. 2½ coupon 11/15/72-67 of the par value of $2,000.00 and Alabama Bridge Finance Corporation 1½ coupon 1/1/50 of the par value of $3,000; and the said W. O. Brownfield is to give a full and complete receipt for same upon the receipt of said bonds;

"AND IT IS ordered, adjudged and decreed that the Treasurer of the State of Alabama be relieved of all liability upon the delivery of the said bonds to W. O. Brownfield as Receiver.

"IT IS FURTHER ordered, adjudged and decreed that the Hospital Care Corporation pay and turn over to W. O. Brownfield as Receiver the sum of $69.34, now deposited to its credit in the First National Bank of Auburn, Alabama.

"IT IS FURTHER ordered, adjudged and decreed that the said W. O. Brownfield as Receiver shall make proper sale of such bonds after receipt by him and make due report to this Court of receiving such bonds and the sale money and hold same subject to further orders of this Court.

"Done at Opelika, Alabama, this 12th day of August, 1949.

(Signed) Albert Hooton
JUDGE"

From the above, it is obvious that this corporation has been dissolved by order of the Circuit Court of Lee County in Equity, and that W. O. Brownfield, Register in Chancery of Lee County, Alabama, has been appointed receiver by the Court.

It is my opinion that you do not have any discretion in this matter but should obey the order of the Court or you might be guilty of contempt.

Title 10, Sections 103 and 106, Code of Alabama 1940, are as follows:

"§ 103. The assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshalled and administered in courts having equity jurisdiction in this state."

§ 106. Whenever any corporation shall become insolvent, or shall suspend its ordinary business for the lack of funds to carry

on the same, any creditor or stockholder, or any number of creditors or stockholders, may by bill or petition apply to the circuit court of the county in which the corporation has its principal place of business, or to any court in such place possessing chancery jurisdiction, for a writ of injunction and appointment of a receiver, and the dissolution of the corporation, and may file affidavits in support of such bill or petition, and the court being satisfied from affidavits submitted, or other proof, of the sufficiency of the application and the truth of the allegations in the bill or petition contained, and after such notice to the corporation, if any, as the court may prescribe, may proceed to hear the proof, which may be offered by the parties and if, upon such hearing, it appear to the court that the corporation has become insolvent, and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation, its officers and agents, from exercising any of its privileges or franchises, and from collecting and receiving any debts or paying out, assigning, or transferring any of its moneys, funds, estates, lands, tenements, or effects, except as to a receiver appointed by the court, until the court shall otherwise order. The court at the time of ordering the injunction, or any time thereafter, may appoint a receiver of all the property and assets of the corporation, who shall qualify and give bond in a sum to be fixed by the judge, conditioned to faithfully discharge his duties as such receiver, and under the direction of the court, must exercise the same powers and perform the same duties as are required of receivers in the next preceding section, and otherwise manage the affairs of the corporation pending final settlement thereof as the court shall direct. Upon the final settlement of the affairs of the corporation, the court must dissolve the corporation by decree, unless prior thereto, the debts having been paid or provided for, and sufficient funds provided for the resumption of business with safety to the public and advantage to the stockholders, the court on motion of the persons holding the larger amount in value of the capital stock, shall have dismissed the bill or petition and restored the corporation to its property, rights, and franchises.

If the receiver appointed by the Court could not obtain possession of these assets of the dissolved corporation, it would be impossible for him to ever liquidate the affairs of the company.

Your reference to Title 28, Article 3, Code of Alabama 1940, is to Title 28, Chapter 10, Article 3, Code of Alabama 1940. I find nothing in these statutory provisions which militates against the conclusion here reached.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

November 23, 1949.

Hon. Norvelle R. Leigh, Jr.,
Judge of Probate,
Mobile County,
Mobile 1, Alabama.

Filing Tax—Mortgages—Taxation—Taxes.

When a mortgage is amended by a subsequent instrument and both instruments are offered for record simultaneously under the provisions of Title 51, Section 619, Code of Alabama 1940, the privilege or license tax due upon such instruments should be based upon the amount actually secured by the mortgage, as amended.

Opinion by Assistant Attorney General Metcalf.

Dear Sir:

Your request for an official opinion, bearing date of October 31, 1949, is as follows:

"Enclosed herewith are copies of two instruments (one dated August 18, 1948 and the other, October 21, 1949), filed simultaneously for record in this office on October 25, 1949.

"The instrument dated August 18, 1948, as you will observe from the copy, is a mortgage executed by Mobile Paper Mill Company, a corporation, to J. R. Boykin, as Trustee, to secure an indebtedness of $268,000.00 for money loaned by the mortgagee to the mortgagor.

"The instrument dated October 21, 1949, is an agreement between the Mobile Paper Mill Company and J. R. Boykin and, in pertinent part, states in substance that it is executed to correct an error in the original mortgage and that instead of $268,000.00 having been loaned, the actual amount was only $218,000.00.

"The attorneys who filed these papers for record contended that a mortgage tax should be paid only on $218,000.00, but in order to save ourselves harmless we demanded taxes on $268,000.00 and this amount the attorneys paid under protest.

"We are holding 'in suspense account' the payment made until it can be ascertained on what amount tax should be paid.

"Will you, at your earliest convenience, kindly advise whether tax should have been collected on $268,000.00 or $218,000.00 so we may make proper refund if attorneys for the mortgagee are correct in their contention that payment should be made only on the smaller amount?"

The amount of the mortgage offered for record in your office by the Mobile Paper Mill Company is $218,000.00, and this is the amount upon which the privilege or license tax should be collected.

Title 51, Section 619, Code of Alabama 1940, provides, in part, as follows:

> "§ 619. Mortgages, deeds of trust, etc.; recordation.—No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this state, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record to-wit: (a) Upon all such instruments which are executed to secure any indebtedness which shall not exceed one hundred dollars, there shall be paid the sum of fifteen cents, and upon all instruments which shall be executed to secure the indebtedness of more than one hundred dollars there shall be paid the sum of **fifteen cents for each one hundred dollars** of such indebtedness, or fraction thereof, which is **secured by said mortgage**, deed of trust, contract of conditional sale, or other instrument of like character. * * * * (Emphasis supplied.)

The two instruments enclosed by you compose the single mortgage offered for record in your office. While the mortgage is composed of two instruments (one dated August 18, 1948 and the other,—October 21, 1949), they were filed simultaneously for record in your office on October 25, 1949, and they are deemed parts of the same transaction.

The first instrument is a mortgage executed by the Mobile Paper Mill Company to J. R. Boykin, as trustee; and the second is an agreement to correct an error in this same mortgage, stating that instead of $268,000.00 having been loaned, the actual amount secured by the mortgage is $218,000.00.

Broadly speaking, a mortgage is governed by the same rules of interpretation that apply to written instruments or contracts generally. The primary rule of construction is to ascertain the **intention of the parties.** This is done not only from the face of the instrument, but also from the situation of the parties and the nature and object of their transaction. 36 Am. Jur., Mortgages, Section 122. A mortgage and the notes secured thereby are to be deemed parts of one transaction, and, as such are to be construed together. 36 Am. Jur., Mortgages, Section 123.

It is the obvious intention of the parties that the two instruments should be construed together. The second instrument is an addition or rider to the first, without which a contract would be in existence contrary to the desires of the contracting parties. This addition is a correction which amounts to a substituted or lesser security, and the secured indebtedness upon which the mortgage tax must be paid has been changed in

amount and in composition. Two writings, connected by reference therein to each other or executed simultaneously with respect to the same subject matter and proved to be parts of an entire transaction constitute but a single contract, as if embodied in a single instrument. **Moorer v. Tensaw Land & Timber Co.**, 246 Ala. 223, 20 So. 2d 105; **Albert v. Nixon**, 229 Ala. 273, 156 So. 775.

Therefore, the amount actually secured by the mortgage, as amended, was $218,000.00, when the same was offered for record in your office, and you should base the filing tax on said amount.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 5, 1949.

Hon. B. L. Balch,
Superintendent of Education,
Macon County,
Tuskegee, Alabama.

Schools—County Boards of Education—Opinions Overruled, Modified or Distinguished.

1. The phrase "residing near the schoolhouse," as used in Title 52, Section 100, Code of Alabama 1940, relating to the appointment of three trustees for every school in the county, includes all persons residing in the territory served by the school, regardless of the actual mileage distance such persons may live from the schoolhouse.

2. The term "patrons," as used in Title 52, Section 100, Code of Alabama 1940, must be construed to include both parents and guardians of children in attendance at the school and qualified electors residing in the territory served by the school, whether such electors be parents or guardians or not.

3. Opinions of this office found in Biennial Report of Attorney General, 1934-1936, page 648, and in Quarterly Report of the Attorney General, Vol. 31, page 92, are overruled and withdrawn.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of October 27, 1949 is as follows:

"A part of Chapter V, Section 100 of the 1940 Alabama School Code reads as follows: 'The county board of education shall appoint

for every school in the county from six discreet, competent, and reliable persons of mature years nominated by the patrons of the said school, three persons residing near the schoolhouse, and having the respect and confidence of the community, to serve as trustees of the school . . .'

"I would appreciate it very much if you would, in the light of the phraseology of this act, give me the legal meaning of the phrase 'near the school house.'

"This law was enacted when in most instances schools were small and served a very definitely defined area. In our modern system of schools, transportation, and better road conditions, communities served by certain schools have been enlarged, and as for the matter of caring for the property, a function formerly performed by trustees, is now usually done by janitors or caretakers. It occurs to me that the phrase 'near the school house' would probably not have the meaning in 1949 that it had in 1925."

The quoted provision, codified as Title 52, Section 100, Code of Alabama 1940, owes its origin to Act No. 442, General Acts 1919, page 567, and with certain changes was brought forward from Section 133 of the Alabama School Code of 1927 into the Code of Alabama 1940. Thus, the phrase therein, "residing near the schoolhouse," was written in the light of conditions existing in 1919, and since enactment there has been no revision or qualification thereof. Your inquiry, therefore, presents the question whether this phrase has the same legal meaning in 1949 which it had in 1919.

In 50 Am. Jur., Statutes, Section 237, we find the following statement as to the rule of statutory construction in regard to the meaning of words, terms, or phrases used in a statute:

"* * * the fact that a situation is new * * * does not preclude the application of the law thereto. The language of a statute may be so broad, and its object so general, as to reach conditions not coming into existence until a long time after its enactment. Indeed, it is a general rule of statutory construction that, in the absence of a contrary indication, legislative enactments, which are prospective in operation and which are couched in general and comprehensive terms broad enough to include unknown things that might spring into existence in the future, even though they are words of the present tense, apply alike to new situations, * * * conditions * * * coming into existence subsequent to their passage, where such situations, * * * conditions * * * are of the same class as those specified, and can reasonably be said to come within the general purview, scope, purpose, and policy of the statute, the mischief sought to be prevented, and the evident meaning of the terms used."

In Sutherland on Statutory Construction (3rd Ed.—1943), Section 4920, it is stated:

"The necessity of providing in modern legislation standards flexible enough to insure the effective application of legislative policy to changing circumstances frequently requires the use of such words as 'reasonable,' 'competent,' 'proper,' 'fair,' etc."

The word "near" is a vague, indefinite, and relative term, the precise import of which can only be determined by the surrounding facts and circumstances in which it is used. See cases cited and collated in 28 Words and Phrases, Permanent Edition, page 110, et seq. Certainly, it is a word of like import to the words used in the above quoted statement from Sutherland on Statutory Construction.

Section 100, supra, reads in full as follows:

"The county board of education shall appoint for every school in the county from six discreet, competent and reliable persons of mature years nominated by the patrons of the said school, three persons **residing near the schoolhouse,** and having the respect and confidence of the community, to serve as trustees of the school, to care for the property, to look after the general interests of the school, and to make to the county board of education, through the county superintendent of education, from time to time, report of the progress and needs of the school, and of the will of the people in regard to the school; provided, that the term 'patrons' as used herein shall be construed to mean the parents and guardians of children in attendance at the school and, whether parents or guardians or not, qualified electors residing in the territory served by the school." (Emphasis supplied.)

I am of the opinion that the phrase must be interpreted in conformity with the purposes for which enacted. Availability and accessibility are the primary considerations in the requirement that a school trustee reside near the schoolhouse. The statute contemplates appointment, as trustees, of persons who can conveniently reach the schoolhouse, both at regular time and in emergencies. In 1919, this may have meant only persons living within one or two miles of the schoolhouse. But, today, persons who live at much greater distances are, for all practical purposes, just as near as those who in 1919 lived much closer. School conditions generally, including the distance from home at which children commonly attend school, have changed steadily since 1919. Due to the present day network of highways and the almost exclusive reliance upon motor vehicle transportation, for school attendance purposes a distance of ten miles today is conceivably as near as was a distance of two miles in 1919. Transportation is no barrier, and time is no significant element. Hence, school trustees today who live at much greater distances from the school can discharge their statutory duties, prescribed by Section 100, supra, and by Title 52, Sections 138-147, Code of Alabama 1940, just as efficiently as trustees who in 1919 lived much closer to the school. Moreover, the housekeeping and custodial duties of such trustees, imposed by Section 100, supra, are today considered as supervisory merely, the primary responsibility therefor generally being delegated to janitors, overseers, or caretakers residing in close proximity to the schoolhouse.

In other words, distances which were not considered "near" thirty years ago are so considered today. Means of communication by the radio, rural telephone, the press, and by travel have vastly improved since 1919 and today are more widely used. Hence, the general public's knowledge of, and interest in, school affairs is both more accurate and more widespread. It safely can be said that the interests and welfare of the school are matters of vital concern in the home of every patron residing within the territory served by the school, and that persons throughout such territory stand well informed on school matters. Under existing conditions, it is impossible to conclude that one residing within two miles of the schoolhouse is for that reason alone better qualified to serve as a trustee than a person residing ten miles therefrom. Thus, the meaning of the phrase "residing near the schoolhouse" has changed with the times. From the standpoint of discharging the functions and responsibilities of a school trustee, any person today living within the territory served by the school lives just as "near" to the school as any other person living within that territory. Since no arbitrary mileage distance can be set, the residence eligibility requirement obviously must be determined solely by residence within the territory served by the school.

Therefore, I am of the opinion that the meaning of the phrase "residing near the schoolhouse" is such that today it includes all persons, meeting the statutory qualifications, who reside in the territory served by the school, regardless of the actual mileage distance such persons may live from the schoolhouse. Cf. Biennial Report of the Attorney General, 1928-1930, page 307.

Having reached the conclusion that any person meeting the statutory qualifications and residing within the territory served by the school is eligible for nomination and appointment as trustee, there arises the question whether residence within such territory can, with reasonable certainty, be determined. This question forces its attention by virtue of the fact that in two former opinions, one found in Biennial Report of the Attorney General, 1934-1936, page 648, and the other in Quarterly Report of the Attorney General, Vol. 31, page 92, the conclusion was reached that, since it is not possible to determine whether a qualified elector without children attending the school resides in the "attendance district" of the school or in the "territory served" by the school, the term "patrons" includes only those persons who are parents or guardians of children in attendance at the school.

Having re-examined these opinions, I am convinced that they were cast in error and are not in accord with the legislative history of Section 100, supra. They are hereby overruled and withdrawn.

The amendment of Section 133, Alabama School Code of 1927, made by Section 3 of Act No. 507, General Acts 1935, page 1090, provided that the term "patrons" should include "qualified electors residing in the attendance district of the school." In an effort to meet the difficulty pointed out in the opinion expressed in Biennial Report of the Attorney General, 1934-1936, page 648, the Code Committee, in writing the Code of

Alabama 1940, changed the phrase "qualified electors residing in the attendance district of the school" to read "qualified electors residing in the territory served by the school." The 1940 revision was then nullified by the opinion expressed in Quarterly Report of the Attorney General, Vol. 31, page 92.

Thus, both the express language of the statute and its legislative history show a clear legislative intent that the term "patrons" shall not be construed as limited to parents or guardians having children in attendance at the school, but also shall include all qualified electors residing in the territory served by the school.

The problem of identifying that territory is one which may sometimes arise, but the problem is by nature administrative and does not challenge the validity of the law. Indeed, the problem of applying the statute is more apparent than real. While some difficulty will be encountered in isolated and exceptional cases, in most instances no difficulty will be experienced. The territory served by a school, though having no statutory boundaries, is well known and understood in the community. It can be defined as that area, however irregular its boundaries may be, from which the school draws the vast majority of its pupils. This generally will be the attendance district of that school. See Title 52, Sections 95 and 314, Code of Alabama 1940, and opinion rendered the Honorable G. E. Weaver, Superintendent of Education of Blount County, on August 16, 1949, a copy of which is enclosed for your information. Such boundaries may sometimes fade into a penumbra presenting difficulty of decision in the case of a person who is neither parent nor guardian having children in attendance at the school; but in my judgment this occasional difficulty cannot be magnified so as to disfranchise large numbers of qualified electors who without question live in the territory served by the school, as to whom the Legislature has twice expressed itself in plain, clear, and unambiguous language as being included in the term "patrons." These occasional difficulties cannot be anticipated individually, and must be met and solved as they arise. Had the Legislature concluded that school affairs are of interest only to parents and guardians having children in attendance at the school, it would have been a simple matter for it to have limited both trustees and patrons to such parents and guardians, but it did not do so.

Therefore, I am of the opinion that the term "patrons," as used in Section 100, supra, must be construed to include both parents and guardians of children in attendance at the school and qualified electors residing in the territory served by the school, whether such electors be parents or guardians or not, and that such territory can be sufficiently identified to serve as a basis for determining one's eligibility to participate in mass meetings called for the purpose of nominating school trustees.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

December 6, 1949.

Hon. G. S. Davis,
Chairman, Board of Revenue,
Marion County,
Hamilton, Alabama.

Hospitals—Counties—Boards of Revenue.

1. A county may construct, operate, and maintain public hospitals within the county.

2. Under the provisions of the Hill-Burton Act (Public Law 725—79th Congress), and Act No. 211, General Acts 1945, page 330, a county, through its county governing body, may become an applicant for federal participation in the construction of a public hospital, even though a hospital association has been organized within the county.

3. Under Section 13 of Act No. 211, General Acts 1945, page 330, it is not mandatory that the county governing body appropriate or turn over any funds to the county hospital association.

4. All applications for federal participation in the construction of public hospitals, pursuant to the provisions of the Hill-Burton Act (Public Law 725—79th Congress), and Act No. 211, General Acts 1945, page 330, must secure the approval of the State agency and the United States Public Health Service, and conform to the rules promulgated by such bodies.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of September 17, 1949, is as follows:

"I am writing you as Chairman of the Marion County Board of Revenue.

"Marion County in the year 1948 voted approvingly on a $100,000 general obligation bond issue for the purpose of building a general county hospital under the Hill-Burton Act. The bonds were sold and the $100,000 is now on deposit. Marion County Board of Revenue at this time is in the process of negotiating a loan from the RFC for $125,000, the sole security for the loan to be the operating revenue from the hospital after the same has been constructed. After this loan is obtained, we then expect to obtain the one-third-cost grant under the Hill-Burton Act.

"We fear that complications on the RFC loan will develop if we attempt to pay over the proceeds of said RFC loan to a non-profit hospital association organized here in Marion County, Alabama. In other words, we are interested in operating the county hospital, after the same is constructed by the Marion County Board of Revenue, by such Board of Revenue rather than by a non-profit association; this being our wish since the county is fully liable on the general obligation bond issue and will have the responsibility in addition of paying back the RFC loan out of the operating revenue from the hospital after the same is constructed.

"I want to cite you to Section 204(4) of Title 22 of the 1940 Code of Alabama, as amended, and ask this question:

"Can Marion County through its governing body, Marion County Board of Revenue, construct, operate and maintain such county general hospital under Sections 204(1) through 204(17) of Title 22 of the 1940 Code of Alabama, as amended, without turning its funds over to a non-profit hospital association formed in the county under said title?"

Under Title 22, Section 189, Code of Alabama 1940, the board of revenue of any county may establish hospitals within the county, and may make all needful rules and regulations for the control and management thereof. Such a hospital erected within a county is a county building. Title 12, Section 185, Code of Alabama 1940. County buildings are to be erected and kept in order and repair at the expense of the county. Title 12, Section 178, Code of Alabama 1940.

From the above noted provisions of our Code, it is clear that a county board of revenue may erect and maintain a county hospital, the expense thereof being paid from county funds.

Under the provisions of the Hill-Burton Act (Public Law 725—79th Congress), authorizing federal participation in the construction of public hospitals, it is provided that as a condition precedent to the approval of any state application for funds such state must designate a single state agency as the sole agency for carrying out the purposes and provisions of said federal enactment.

Under Act No. 211, General Acts 1945, page 330, the State Board of Health is designated as the sole state agency for such purposes in the State of Alabama. Under the Hill-Burton Act and Act No. 211, supra, the state agency designated is authorized and required to prepare and submit for the approval of the Surgeon General of the United States a master hospital plan for the state, which master plan surveys and establishes existing hospital needs.

Section 2 of Act No. 211, supra, provides as follows:

"Section 2. The State Board of Health is hereby authorized and empowered to acquire, construct, equip, maintain, and operate public

hospitals, health centers, and related facilities for the treatment of any type of disease. The State Board of Health is authorized and empowered to cooperate and to make contract with the United States Government, **any local political subdivision** or their agencies, any non-profit association or public improvement society in the acquisition, building, equipping, maintaining, and operation of any public hospitals, health centers, and related facilities for the treatment of any type of disease." (Emphasis supplied.)

The phraseology "any local political subdivision" would include a county.

From the above, it is seen that a county as such may be an applicant for federal participation in the construction of a public county hospital. Sections 1-8 of Act No. 211, supra (Title 22, Sections 204(3)-204(10), 1947 Cumulative Pocket Part, Code of Alabama 1940), authorize the establishment within the various counties of hospital associations, and prescribe and enumerate said associations' powers and authority relative to the construction and maintenance of public hospitals. If a hospital association is established under the provisions of Sections 9-12 of Act No. 211, supra, then under the authority of Section 13 the county may appropriate county funds to the association. However, a reading of Section 13 reveals that this is not mandatory.

Thus, construing Act No. 211, supra, as a whole, it is apparent that the two component parts thereof are severable. So construed, a county as such may become an applicant for federal participation in the construction of a public hospital acting through its county governing body. This is true even though there has become established within the county a county hospital association pursuant to the provisions of Sections 9-13 of Act No. 211, supra. It is my conclusion that those provisions of Act No. 211, supra, relating to the establishment of a county hospital association, merely provide an additional method by which the citizens of the county may construct and maintain a public hospital.

I feel that I should call your attention to the fact that all applicants for federal participation in the construction of public hospitals must comply with the rules and regulations prescribed by the state agency and the United States Public Health Service, and all applicants must be approved by said agencies. Also, the project for which federal participation is sought must be included within the master plan of the state agency, and, of course, is subjected to the system of priorities as determined by that body. Your attention is further directed to the fact that under the rules and regulations of the United States Public Health Service, established in conformity with the mandates of the Hill-Burton Act, it is provided that before approval of federal participation the state agency must certify to the Surgeon General of the United States that the application contains reasonable assurance as to financial support for the non-federal share of the costs of construction and the entire costs of maintenance and operation when completed. These same rules and regulations provide that availability of funds for the non-federal share of construction costs shall mean (a) funds immediately available, placed in escrow, or

acceptably pledged, or (b) funds or fund sources specifically earmarked in a sum sufficient for that purpose, or (c) other assurances acceptable to the Surgeon General of the United States.

Answering your questions specifically, you are advised that Marion County, through its governing body, the Marion County Board of Revenue, may construct, operate, and maintain a public hospital within the county; said county, through its governing body, may become an applicant for federal participation in the construction of such a hospital under Sections 1-8 of Act No. 211, supra (Title 22, Sections 204(3)-204(10), 1947 Cumulative Pocket Part, Code of Alabama 1940), and such being the case the provisions of Section 9-13 of Act No. 211, supra (Title 22, Sections 204(11)-204(15), 1947 Cumulative Pocket Part, Code of Alabama 1940), are not applicable. As previously pointed out, Section 13 of Act No. 211, supra, does not make it mandatory that the county governing body appropriate or turn over any funds to the county hospital association.

This opinion in no way conflicts with the opinion reported in Quarterly Report of Attorney General, Vol. 53, page 188, in view of the fact that the questions there posed related solely to the construction and operation of a hospital by and through a county hospital association; whereas, your inquiry concerns the construction and operation of a hospital by and through the governing body of the county, independent of any connection with a hospital association which may have been organized within the county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 6, 1949.

Miss Marcella M. Nicholson,
Register in Equity,
Circuit Court of Bibb County,
Centreville, Alabama.

Registers—Commission on Sales.

1. A register making a sale for division pursuant to court order is entitled to the commission allowed by Title 11, Section 27, Code of Alabama 1940, as amended, upon the total sum representing the purchase price received for such property, although a portion of the purchase money is not actually paid to the register but is credited on the debt due the purchaser.

2. In a sale of real property for division under court order, if the purchaser already owns an undivided interest in such property, it is not necessary that such purchaser pay to the register the sum representing his already-owned interest therein, but

such may be credited upon the debt due the purchaser as a result of such sale.

Opinion by Assistant Attorney General Hardin.

Dear Madam:

Your request for an official opinion, bearing date of October 6, 1949, is as follows:

"I desire your official opinion upon the question hereinafter propounded, in connection with the following statement of facts:

"There is a cause pending in the Circuit Court in Equity of Bibb County, Alabama, of which Court I am the Register, wherein a sale for division was sought for certain real estate. The property was ordered sold by the Court and in pursuance with said order was sold by me as the Register at public sale. The purchaser at said sale owned a 9/10 undivided interest in said real estate. The sale price for said property was $30,000.00. The purchaser desires to pay into my hands the sum of $3,000.00, which is the sales price for the 1/10 interest owned by the other joint owners and tenants in common. He also desires to pay into my hands 9/10 of all of the costs, including my commissions, and attorney's fees, in this proceeding; the other 1/10 of the costs, of course, will be deducted from the 1/10 interest, or the $3,000.00 paid into my hands, under his proposal.

"Under the above arrangement, and assuming that the purchaser paid into my hands the $3,000.00 above mentioned, plus the costs and fees above mentioned, would I, as the Register making the sale of said property, be entitled to my commission for making said sale calculated on the basis of the entire $30,000.00?

"Since the purchaser owns 9/10 of said property, must I require him to pay the entire $30,000.00, sales price, into my hands, and then when the sale is approved by the Court, refund to him, or pay to him the 9/10 interest that he owns in said property?

"In other words, under the uniform accounting system, could I give him credit in some manner for his share of the proceeds without him having to pay that amount into my hands?

"To be quite frank about it, I am interested to collect my fees on the $30,000.00, and on the other hand, the purchaser would have to borrow the money that he pays into my hands, and would like to avoid the additional expense to him. It would be quite an accommodation to the purchaser if the above suggested arrangement could be legally made.

"I will appreciate your immediate opinion on this, as time is a very necessary element."

The only statute necessary of consideration in giving answer to your inquiry is that portion of Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262, pertaining to the fees allowed registers as commissions on sales. The pertinent portion of said statute is as follows:

> "Commissions on sales: For the first three hundred dollars, two percent; for all over three hundred dollars, and not exceeding two thousand dollars, one and one-half percent; for all over two thousand dollars and not exceeding twenty thousand dollars, one percent; and for all over twenty thousand dollars, one-fourth of one percent. * * *"

An analogous situation to that presented by your inquiry was considered by this office in an opinion rendered to Miss Helen Lonnergan, Register of the Circuit Court of St. Clair County, under date of May 2, 1942 (Quarterly Report of Attorney General, Volume 27, page 58), wherein, in considering the above-quoted portion of Section 27, supra, it was stated that:

> "There is no ambiguity in this language. It definitely and in detail fixes your compensation for sales made under orders and decrees of the circuit court, sitting in equity. The statute is not concerned with the bidders or purchasers at such a sale. The right to this fee hinges on whether or not you made a sale under such orders. This is true although the purchase money is not actually paid to the register but, instead, is credited on the debt due the purchaser. This is so self-evident that it is unnecessary to site any authorities."

Like reasoning and logic are applicable to the instant situation and I, therefore, advise you that you are entitled to your commission upon the total sum realized from such sale, i.e., $30,000.00, even though a portion of the amount is not paid to you. See also Quarterly Report of Attorney General, Volume 38, page 25, which opinion, in theory, supports the conclusion here reached.

In answer to your second inquiry, I am of the opinion that you need not require the purchaser, who already owns an undivided nine-tenth interest in said property, to pay the full purchase price into court in order that it may be refunded to him. In my judgment, this would be a vain and useless act, resulting only in unnecessary delay and expense to this purchaser. Neither, in my opinion, does any legal objection exist preventing you from following the procedure outlined by you in your inquiry, that is, allowing the purchaser to pay to you one-tenth of such purchase price, representing the part now owned by him, together with nine-tenths of the total cost, including your commission, arising in connection with such sale for division. This, in my judgment, may be accomplished in keeping with sound bookkeeping and auditing procedure.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 6, 1940.

Hon. A. R. Meadows,
State Superintendent of Education,
State Department of Education,
Montgomery, Alabama.

County Boards of Education—Schools—Funds.

1. The county board of education may legally expend school funds for the purchase of band uniforms for the school band, which uniforms are to be owned by the school and not by the individual members of the band.

2. Quarterly Report of Attorney General, Vol. 28, page 171, overruled and withdrawn.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of November 23, 1949, is as follows:

"The Greene County Board of Education appropriated $500.00 to help purchase band uniforms for the Greene County High School band. The uniforms are the property of the Greene County High School and are not owned by individual students. The school keeps the uniforms for the County Board of Education until they are worn out by the different students using them from time to time, somewhat similar to musical instruments used by the band. The band is an integral part of the public school program. Credit is allowed for successful participation in band music.

"Mr. S. D. Bayer, Superintendent of the Greene County Schools, informs me that the Examiner of Accounts auditing the financial transaction of the Greene County Board of Education claims that the appropriation for the Greene County High School band uniforms is illegal and the Department of Examiners of Accounts has charged the $500.00 back to him. Superintendent Bayer is most anxious to have, and I herewith request, your opinion as to whether or not a county board of education can legally expend school funds for band uniforms to be owned by the school, and not by individuals."

In an opinion of this office to Hon. L. W. Brannan, Jr., Member of the House of Representatives, Baldwin County, under date of October 4, 1949 (Ms.), in which it was held that local school boards may legally authorize the use of school busses to transport high school bands to and from athletic contests, it was said:

"This office has previously held that the county board of education has authority to spend school funds for the purchase of band

instruments. Quarterly Report of Attorney General, Vol. 6, page 85; Quarterly Report of Attorney General, Vol. 8, page 320.

"This office has also held that the governing body of a county has authority to appropriate funds to aid public high schools in the purchase of music instruments for bands. Quarterly Report of Attorney General, Vol. 51, page 102; Quarterly Report of Attorney General, Vol. 53, page 16.

"The State Department of Education informs me that band music is an approved subject in the course of study in the high schools of the State. Transportation of a high school band to and from athletic contests in which the high school is engaged is in furtherance of the course of instruction in band music. * * *"

It is my conclusion that for the proper performance of a high school band the members must necessarily wear suitable uniforms. Such uniforms are as necessary as the band instruments themselves. The purchase of such uniforms is in the furtherance on an approved subject in the course of study in the high schools of the State.

It is, therefore, my opinion that the county board of education may legally expend school funds for the purchase of band uniforms which are to be owned by the school and not by the individual members of the band.

An opinion of this office found in Quarterly Report of Attorney General, Vol. 28, page 171, in which a contrary conclusion was reached, is hereby expressly overruled and withdrawn.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 6, 1949.

Hon. Jeff D. Smith, Solicitor,
Twenty-Third Judicial Circuit,
Huntsville, Alabama.
Gaming and Lotteries.

A trade stimulation scheme, whereby certificates are given with purchases of merchandise at regular prices and the distribution of a prize is not determined by lot, but is awarded to the person holding the greatest number of certificates representing the greater value of purchases, is not a lottery within the meaning of Section 65, Constitution of Alabama 1901 and Title 14, Section 275, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of October 25, 1949, is as follows:

"We have a number of merchants in Huntsville who are desirous of sponsoring a race during the months of November and December, at the end of said race, prizes will be awarded to the winner.

"The scheme is, that at a local center there will be a Christmas Tree. When a person makes a purchase from one of the participating merchants, they will receive a certificate. Each certificate that they receive will entitle them to a light on the Christmas Tree and at the end of the contest the person having the most lights on the tree wins the race and of course, wins the prize. Of course, there will not be individual lights for each certificate issued, but a number on the Christmas Tree will be given to each party entering the race and each certificate that the party sends in to the operating center will increase the number on the light.

"The operating center will say this 'Send in your certificate or a reasonable facsimile thereof.' In order for a person to participate in this race they will have to get said certificate by a purchase at one of the local merchants, of course, they can send in a reasonable facsimile, which they can make without charge. The merchants contend that in as much as a person can send in a reasonable facsimile without charge it is not mandatory for a consideration to be paid and because it is not mandatory for a consideration to be paid to enter the contest, they feel that this scheme is not a violation of Section 275, Article 3, Chapter 46, Title 14, 1940 Code of Alabama.

"It is respectfully requested that an official opinion be made as to:

"1. Whether or not parties who participate in the above scheme will be guilty under the above mentioned section, even though a consideration is not mandatory.

"2. Does the above scheme violate the lottery laws of Alabama?"

I am of the opinion that each of your questions must be answered in the negative.

Lotteries or devices of like kind, or any gift enterprises, or any schemes in the nature of a lottery or gift enterprise are prohibited both by the Constitution itself and by the statutory law of this state. See Secion 65, Constitution of Alabama 1901 and Title 14, Section 275, Code of Alabama 1940. The Supreme Court has defined a lottery as involving the essential elements of a prize, awarded by chance, for a con-

sideration. **Minges et al, v. City of Birmingham,** 251 Ala. 65, 36 So. 2d 93; **Opinion of the Justices** (Ala.) 31 So. 2d 753; **Grimes v. State,** 235 Ala. 192, 178 So. 73; Quarterly Report of the Attorney General, Vol. 49, page 30.

No law prevents nor can prevent the gratuitous distribution of one's property. The constitutional and statutory prohibitions are aimed at the distribution of one's property as a prize, awarded by chance, for a consideration. Hence, chance is an essential element of an illegal gift enterprise, and if chance be absent a gift enterprise is not in the nature of a lottery.

The plan which you present is, in my judgment, analogous to, if not identical with, so-called vote contests or popularity contests, since I assume that the certificates will be awarded on a dollar volume basis, award of the prize to be made to the person acquiring the highest number of certificates. Although not here material, I further assume that the certificates will be considered as negotiable or assignable, at least as between members of a single family or household.

Although the specific question has not been decided by the courts of this state and while there is authority to the contrary, the minority view being most forcibly expressed in **National Thrift Assn. v. Crews,** 116 Ore. 352, 241 Pac. 72, and in **Corporate Organization, etc., Co. v. Hodges,** 47 App. (D. C.) 460, LRA 1918E 491, the weight of authority in other jurisdictions holds that so-called vote contests or popularity contests are not lotteries because of the absence of the element of chance. See: **State v. Lindsay,** 110 Vt. 120, 2 Atl. 2d 201; **Amlie Strand Hardware Co. v. Moose,** 176 Minn. 698, 224 N. W. 158; **Brenard Mfg. Co. v. Jessup and Barnett Co.,** 186 Iowa 872, 173 N. W. 101; **Whitman v. Fournier,** 233 Mass. 154, 125 N. E. 303; **Guy v. National City Bank,** 24 Ga. App. 281, 100 S. E. 648; **National Sales, etc. v. Manciet,** 83 Ore. 34, 162 Pac. 1055; **Quatsoe v. Eggleston,** 42 Ore. 315, 71 Pac. 66; **Boston Piano and Music Co. v. Seckinger,** 198 Mich. 312, 164 N. W. 263; **Conqueror Trust Co. v. Simmon,** 62 Okla. 252, 162 Pac. 1098; **Millsaps v. Urban,** 116 Ark. 90, 171 S. W. 1198; **Commonwealth v. Jenkins,** 159 Ky. 80, 166 S. W. 794; **Dion v. St. John Bap? tiste Society,** 82 Me. 319, 19 Atl. 825; 38 Corpus Juris 300, Section 24; 54 Corpus Juris Secundum 852, Section 7; 34 Am. Juris. 660, Section 17; Decen. Digests, Lotteries, Key No. 3; 41 A. L. R. 1484, Note.

Although among the arguments generally leveled at such contests are that they have all the vice and seductiveness of a lottery and by appeals to cupidity they lure to improvidence by inducing persons to purchase more than they need, in my judgment the award of the prize is determined not by chance, but largely by hustle and initiative. Our statute does not prohibit all gift enterprises, but only those in the nature of a lottery. Cf. **Brenard Mfg. Co. v. Benjamin and Sons,** 172 N. C. 53, 89 S. E. 797, wherein the North Carolina Statute prohibited gift enterprises of any character. True, those who buy merchandise primarily to secure certificates risk a chance that someone else will buy more merchandise, but in my view it cannot be said that the prize

is awarded by chance. Before the contest starts it is known that the prize will be awarded to that person who, although as yet unidentified, buys the most merchandise or otherwise acquires the greater number of certificates.

I, therefore, am of the opinion that the plan proposed in your inquiry does not fall within the letter of the law and is not a lottery within the meaning of Sections 65 and 275, supra. **Conqueror Trust Co. v. Simmon,** supra, presents identical facts and reaches the same conclusion. If the public policy of this state be opposed to schemes of this sort as embracing all the evils of a lottery, it is within the power of the Legislature to so declare.

It is the element of chance, not the element of consideration, which is lacking, consideration being found in the price paid for the merchandise. **Grimes v. State,** supra; **Try-Me Bottling Company v. State,** 235 Ala. 207, 178 So. 231. Hence, the fact that the contest rules may stipulate that "reasonable facsimiles" will be accepted in lieu of actual certificates is not material, such a rule being neither necessary nor desirable. If adopted it would be observed solely for the purpose of evading the lottery laws and would be a subterfuge abhorred by the law. If observed the door would be open for unlimited opportunities for unfairness and its observance would partially, if not completely, defeat the trade stimulation purposes of the contest.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

December 6, 1949.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Credit Unions—Excise Tax—Exemptions—Financial Institutions—Taxation—United States.

Federal credit unions are not subject to the excise tax imposed on financial institutions by Title 51, Sections 425-431, Code of Alabama 1940, because of their immunity as Federal instrumentalities.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of July 25, 1949, is as follows:

"I would like your official opinion on the following point:

"Under Section 18, 'Taxation' of the Federal Credit Union Act as amended to June 15, 1940, are Federal Credit Unions subject to the State Excise Tax?"

Federal credit unions are not subject to the Financial Institutions' Excise Tax imposed by Title 51, Sections 425-431, Code of Alabama 1940.

This particular tax, by its terms, is imposed upon "any person, firm, corporation and any legal entity whatever doing business in this state as a national banking association, bank, banking association, trust company, industrial or other loan company, building and loan association and shall likewise include **any other institution or person employing moneyed capital coming into competition with the business of national banks,** and shall apply to such person or institution regardless of what business form and whether or not incorporated, whether of issue or not, and by whatsoever authority existing." (Emphasis added.) Title 51, Section 425, Code of Alabama 1940.

Since credit unions employ moneyed capital, and since they come into "competition with the business of national banks," such credit unions are within the scope of Sections 425-431, supra. Cf. Quarterly Report of Attorney General, Vol. III, p. 104. Therefore, if Federal credit unions are exempt from the operation of the Alabama Financial Institutions' Excise Tax, they are exempt as Federal instrumentalities, and not because of the inherent nature of their operations.

As Federal instrumentalities, Federal credit unions are not subject to taxation by the states, unless Congress, acting within its constitutional powers, has expressly consented to such taxation. **Western Railway of Alabama v. State,** 241 Ala. 440 (1941), 3 So. 2d 9; **Federal Land Bank of New Orleans v. Crosland,** 261 U. S. 374, 43 S. Ct. 385, 67 L. Ed. 703 (1922); **McCulloch v. Maryland,** 4 Wheat. 316 (1819).

Federal credit unions are authorized under the Federal Credit Union Act (12 U. S. C. 1751 et seq.). Section 18 of this Act (12 U. S. C. 1768) is quoted, in pertinent part, as follows:

"The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be **exempt from all taxation** now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; **except** that any **real property** and any **tangible personal property** of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed." (Emphasis added.)

The excise tax on financial institutions is not a tax on real property or on tangible personal property, but is a tax upon the privilege of engaging in business of a banking nature. Title 51, Section 425(b), Code of Ala-

bama 1940. **Title Guarantee Company v. State**, 228 Ala. 636, 155 So. 305 (1934) As a privilege tax, it is not within the area of taxation specifically allowed by the Federal Credit Union Act.

An argument for taxability would run: Congress must have realized that Federal credit unions are exempt, as a matter of constitutional law, from state taxation absent Congressional consent; Congress did, however, specify certain state tax immunities for Federal credit unions; hence, Congress by implication allowed state taxation which was not of the types specified in Section 1768, supra. This argument, based on the rule—inclusio unius est exclusio alterius, is not persuasive. Given the well-established immunity of Federal instrumentalities from state taxation, one cannot base authority for state taxation on implied Congressional consent. This is especially true where the implication itself is not clear.

To reiterate, the excise tax imposed on financial institutions by Title 51, Sections 425-341, supra, does not apply to Federal credit unions.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 6, 1949.

Honorable M. G. Hale,
Chairman, Board of Revenue,
Colbert County,
Tuscumbia, Alabama.

Acts 1949, No. 674—Barber Commission—Barber Shops—Board of Revenue—Colbert County—Counties—Legislature.

Board of Revenue of Colbert County authorized to pay cost of publication of notice of intention to introduce local bill, H. 1115, which became Act No. 674, Acts of Alabama, 1949.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of October 11, 1949, is as follows:

"I am requested by the Board of Revenue of Colbert County, Alabama, to write you for an opinion as to whether the Board can legally pay out of the County Treasury for the advertisement in a local newspaper of the County of the intention to apply to the Legislature of Alabama, during the regular session of 1949 under Section 106 of the Constitution for the passage of a local Act to be

entitled: 'An Act to define, regulate and license barbers and barber colleges, and other like businesses in Colbert County, Alabama, State of Alabama; and create a Barbers' Commission for said county; and to provide a penalty for the violation of the provisions hereof, and to fix the powers and duties of said Commission.'

"Pursuant to such notice in the newspaper House Bill 1115 was introduced and was passed by the Legislature and was approved and became effective September 19, 1949. This Act is No. 674 of the regular session 1949 of the Legislature.

"The Colbert County Reporter, a newspaper published in this County has presented to this Board a claim for the cost of publication of said notice of intention to introduce the Bill.

"We note from your ruling which appears on page 195 of the Reports of the Attorney General, October-December 1939 that your office ruled that the expenses of advertising local bills, which are of interest to the County and the people as a whole, and not private or individual bills, shall be paid by the County if and when they become laws.

"Please kindly advise whether our Board of Revenue has the legal right to pay for the publication relating to this Act No. 674.

"The Board of Revenue will greatly appreciate a ruling from you upon this question at your earliest convenience."

Title 12, Section 174, Code of Alabama 1940, provides that the expense of publication of the intention to introduce a local bill shall be paid out of the general funds of the county, provided such bills are introduced, passed, and become law.

Title 12, Section 12(13), Code of Alabama 1940, as amended, gives counties authority to pay for publication of notice where bills are to be introduced for the benefit of the county exclusively relating to county business or affairs.

The opinion which you cite, Quarterly Report of the Attorney General, Volume 17, page 195, in construing the then applicable statutes which are now embodied in the above cited Code sections, holds that county governing bodies may pay for publication of notice of intention to introduce local bills when "said bills were of interest to the people of the county as a whole, and were not private or individual bills."

Act No. 674, Acts of Alabama 1949, is an act "to define, regulate and license barbers and barber colleges, and other like businesses in Colbert County, State of Alabama; and create a barbers' Commission for said county; and to provide a penalty for the violations of the provisions hereof, and to fix the powers and duties of said Commission."

The act applies to Colbert County, and, in my opinion, applies to all persons in Colbert County, except "(1) persons engaged in the practice of medicine, surgery or beauty culture, (2) persons actively engaged in the military service of the United States Government while acting in line of duty, (3) registered nurses in the course of their employment as such, (4) persons who render any of said services to members of their immediate families, or other persons who receive such services without charge therefor."

The act provides that no person shall engage in the barbering business in Colbert County, unless he shall comply with the terms of the Act.

It is my opinion that Act No. 674, supra, is a local act of interest to the people of the county as a whole and is not a private or individual bill. Therefore, I am of the opinion that the Board of Revenue of Colbert County should pay the costs of publishing the notice of intention to introduce said bill.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 9, 1949.

Hon. A. C. Cook,
Circuit Clerk and Register,
Wilcox County,
Camden, Alabama.

Elections—Absentee Ballots—Registers.

1. The register, or person serving in his stead, for his services in handling absentee ballots, under Act No. 424, General Acts 1949, page 601, in each election held in this State, other than a municipal election held at a time different from a primary or general election, is entitled to be paid the sum of ten dollars per day for each of the twenty calendar days immediately prior to the election and for the day of the election, whether any absentee ballots are issued or cast in such election or not.

2. In a municipal election held at a time different from a primary or general election, the clerk or person serving in his stead who handles the absentee ballots is entitled to like compensation for a like period of time.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of November 8, 1949, is as follows:

"Will you please answer the following questions for me.

"Is the Register of the Circuit Court entitled to collect from the County $10.00 per day for handling Absentee Ballots in a Primary, General, Special or Municipal election, in the event there are no Absentee Ballots cast in such elections?"

During the 1949 Session of the Legislature of Alabama, Act No. 424, General Acts 1949, page 601, providing a new system for absentee voting in primary, general, special, and municipal elections, was passed and became effective on November 1, 1949.

This act designated the register in chancery in each county to handle absentee ballots in all elections held in this State, other than municipal elections, held at a time different from a primary or general election, with provision for a person to be designated to serve in his stead in the event he is a candidate for any office in the election.

The duties in regard to the handling of absentee ballots which are placed on the register by this act are numerous and real, but it would serve no useful purpose to here detail or summarize the same. Suffice it to say that the officer charged with the printing and distribution of the official ballots and election supplies shall cause a sufficient number of absentee ballots, envelopes, etc., to be delivered to the register not less than twenty-one days prior to the holding of any election, and absentee voting may actually begin twenty days prior to the election. The register must, on the day of the election, deliver the absentee ballots to the election officials and perform certain other duties enumerated in said act. Thus, his duties in regard to the handling of absentee ballots, under said act, begin on the twentieth day prior to the election and do not end until the day of the election.

Section 17 of said act reads as follows:

"For his services under this Act during the twenty days prior to each election to which this Act pertains and for his services on the day of the election, the register, or person acting in his stead, shall be paid the sum of ten dollars ($10) daily. Such payment shall be made from the county treasury, except in the case of a municipal election held at a time different from a primary or general election, in which event payment shall be from the city or town treasury."

It is crystal-clear to me from the above quoted section that the legislature intended that the register should receive for his services under said act the sum of ten dollars per day for each of the twenty days immediately prior to each of the twenty calendar days immediately prior to the election and for the day of the election, including Sundays and legal holidays, if any, and regardless of whether or not any absentee ballots are issued or cast in the election. This was within the legislative competence. See 43 Am. Jur., Public Officers, Sections 342 and 383, and 46 C. J. 1015, where it is stated:

"The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise to the functions of the office; hence, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, * * *"

The premises considered, you are advised that a register, or person serving in his stead, is entitled, for his services in handling absentee ballots, under Act No. 424, supra, to the sum of ten dollars per day for each of the twenty calendar days immediately prior to each election held in this State, other than a municipal election held at a time different from a primary or general election, and also for the day of the election, including Sundays and legal holidays, if any, which fall within that period, regardless of whether or not any absentee ballots are issued or cast in the election.

As to municipal elections held at a time different from a primary or general election, the clerk or person serving in his stead who handles absentee ballots is entitled to like compensation for a like period of time.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 12, 1949.

Hon. H. M. Touart,
Tax Assessor,
Mobile County,
Mobile, Alabama.

Taxation—Tax Assessors—Homesteads—Exemptions—Etowah, Mobile, Montgomery, and Tuscaloosa Counties.

1. Act No. 91, General Acts 1949, page 115, is presently applicable only in the counties of Etowah, Mobile, Montgomery, and Tuscaloosa.

2. It is optional with the tax assessor in each of said counties as to whether said act shall be placed in operation and become effective in his county; but once he elects to place the same in operation and make it effective in his county, he does not have the power subsequently to change or rescind that election.

3. Said act provides a different system for the assessment of ad valorem taxes on property and the claiming of homestead exemptions and exemptions on personal property in the counties to which it applies from that obtaining under the general law.

4. Where there is no change in the ownership or physical status of real estate during a tax year, the taxpayer is not re-

quired to make any report or return to the tax assessor; and the tax assessor, in such event, assesses the same to the party last assessing it or to the owner of record, without any action on the part of the taxpayer.

5. Any person required to report or return to the tax assessor changes in the ownership or physical status of real estate during the prior tax year must do so between October 1 and December 31 of the current tax year, the provisions of Title 51, Sections 37 and 49, Code of Alabama 1940, to the contrary notwithstanding.

6. If a person has once claimed and been allowed a homestead exemption and exemptions on personal property, and there is no change in the circumstances which would cause him to be no longer entitled to such exemptions, he should have the same credited to him by the tax assessor each year, without any subsequent action on his part, the provisions of Title 51, Section 52, Code of Alabama 1940, being without application in such event.

7. Where a taxpayer's status is unchanged, he is under no duty to make any report or return to the tax assessor, and no penalty accrues against him for failure so to do, the provisions of Title 51, Section 52, Code of Alabama 1940, being without application in such event.

8. Title 51, Section 49, Code of Alabama 1940, has no application; the tax assessor is relieved from giving the notice required by said section; and the taxpayer is relieved of the fee for the same.

9. Where a taxpayer makes no report or return, the tax assessor is justified in assuming that the taxpayer's status has remained unchanged and that he has no other property subject to assessment, and in making the assessment without penalties or fees.

10. If a taxpayer is required to make a report or return to the tax assessor because of a change in the physical status of his property during the prior tax year, he must do so between October 1 and December 31 of the current tax year, or the ten per cent penalty for failure so to do accrues.

Opinion by Assistant Attorneys General Garrett and Livingston.

Dear Sir:

Your request for an official opinion, bearing date of July 12, 1949, is as follows:

"I should appreciate your official opinion regarding the following:

"Act No. 91 of the Regular Session of the Legislature, 1949, approved June 17, 1949, provides that between October 1st and January 1st of each year, owners of real and personal property in certain counties of the State of Alabama, shall apply to the several Tax Assessors of said counties, for the purpose of making certain returns, giving certain information, and making claims for exemptions. Please advise me if Sections 37 and 49 of Title 51 of the Revenue Code of Alabama, operate to extend to the third Monday in January the time for making such returns, giving such information, and claiming such exemptions.

"Sections 3 and 5 of the above act provide that, subsequent to October 1, 1949, where a person previously has claimed and been allowed exemptions of homestead and personal property, such person shall not be required annually thereafter to make such claims. Please advise me if this means that a person having once claimed and been allowed exemptions of homstead and personal property, one or both, shall continue in subsequent years, beginning with the 1950 tax year to enjoy such exemptions, even though he fails in such subsequent years to sign his assessment, and consequently it is penalized in accordance with the terms of Section 52 of Title 51 of the Revenue Code of 1940."

I am also in receipt of a request for an official opinion, bearing date of September 20, 1949, from Hon. Bovell Summers, Tax Assessor, Etowah County, Gadsden, Alabama, in regard to said act (Act No. 91, General Acts 1949, page 115), which is as follows:

"Act No. 91 Senate Bill 215, approved by the Governor on June 17, 1949, with respect to the return for assessment of ad valorem taxes on property in counties having a population of not less than 70,000 and not more than 300,000 has come to my attention. There are several phases of this Act which appear to me to be somewhat ambiguous and might be in conflict with other laws pertaining to assessments and possibly could cause some charge-backs against me as Tax Assessor. As Tax Assessor for Etowah County, one of the counties coming within the classification, I request your opinion on the following propositions:

"1. 1940 Code Title 51 Section 52, requires the Tax Assessor, where the taxpayer has not made a return on or before the 3rd Monday in January to make the assessment and add 10% penalty. Does the Act in question, either expressly or by its terms, relieve the taxpayer from this duty where his status is unchanged? Should the Tax Assessor, upon failure of the taxpayer to make a return accrue the penalty?

"2. Title 51 Section 49 where the return for assessment is not made by the taxpayer on or before Dec. 31, requires notice

and a fee of 50c. Does the Act in question relieve the Assessor from the giving of such notice and the taxpayer from such fee?

"3. Under the Act in question would the Tax Assessor be justified in assuming, where taxpayer makes no return, that taxpayer's status has remained unchanged, has no other property subject to assessment, and make the assessment without penalties or fees?

"4. The Act apparently moves up the applicable date for 10% penalty to December 31, if taxpayer is still required to make a return. Is this the proper interpretation?

"Inasmuch as the public is not informed about this Act and the period for commencement of assessments is approaching, it is urgently requested that an early reply to this letter be made."

I deem it advisable to consolidate these two requests for opinions and to render one official opinion in answer thereto for the information and official guidance of the tax assessors of all the counties in the State of Alabama to which said act applies. Inasmuch as it applies only in counties having a population of not less than 70,000 inhabitants and not more than 300,000 inhabitants, according to the last (1940) or any succeeding federal census, its present application is confined to the counties of Etowah, Mobile, Montgomery, and Tuscaloosa, and a copy of this opinion will be sent to the tax assessor of each of these counties.

The act, as its title implies, provides a different system for the assessment of ad valorem taxes on property and the claiming of homestead exemptions and exemptions on personal property in the counties to which it applies from that obtaining in the several counties of the State under the general law on this subject. Insofar as the assessment of ad valorem taxes and the claiming of homestead exemptions is concerned, it appears to be modeled after the so-called "unit" system for the assessment of ad valorem taxes applicable in all counties in the State of Alabama having a population of 300,000, or more, according to the last or any succeeding federal census, which is presently applicable only to Jefferson County. See Title 51, Sections 80 and 84, Code of Alabama 1940, as amended. Title 51, Section 78, Code of Alabama 1940, states the purpose of this system to be "to provide for a more convenient, economical and uniform system of assessing * * * taxes on real estate * * *." I think it may fairly be said that Act No. 91, supra, has a like purpose.

It is to be noted that Sections 2,3 and 5 of said act provide that after October 1, 1949, and annually thereafter, "the tax assessor shall have the right and authority" to do certain things in regard to the assessment of ad valorem taxes on property, the crediting of homestead exemptions, and the crediting of exemptions on personal property. Nowhere in the act is it made his duty to do these things. Thus, it appears that the legislature, in passing said act, made it optional with the tax assessor in each county to which the act applies as to whether it should be placed in operation and become effective in his county. Should a tax assessor

in any county to which the act applies elect not to place it in operation and make it effective in his county, then the assessment of ad valorem taxes on property and the claiming of homestead exemptions and exemptions on personal property in that county would continue to be governed entirely by the provisions of the general law on this subject (Title 51, Chapter 7, Code of Alabama 1940, as amended). I am of the opinion, however, that once a tax assessor in a county to which the act applies elects to place the same in operation and make it effective in his county, he does not have the power subsequently to change or rescind that election. Cf. **State ex rel. Smith v. Justice,** 200 Ala. 483, 76 So. 425.

I shall now consider the effect of said act on the assessment of ad valorem taxes on property and the claiming of homestead exemptions and exemptions on personal property in those counties to which it applies where the tax assessors have elected to place the same in operation and make it effective.

Under Section 2 thereof, the assessor shall, after October 1, 1949, and annually thereafter, assess all real estate, together with the improvements thereon and all furniture and household goods used in and about the curtilage of a home, to the party last assessing the same or to the owner of record, with the assessment showing the information therein specifically required and such other information as the tax assessor may deem necessary, without any action whatsoever on the part of the owner thereof, unless there has been some change in the physical status of the same which would affect its tax liability. If there has been any such change in the physical status of the real estate during the prior tax year, it is the duty of the owner to notify the tax assessor of such change between October 1 and prior to January 1 of the current tax year; and should any person making improvements on real estate during a tax year fail to report the same to the tax assessor between those dates, a ten per cent penalty of the tax value of the real estate and improvements shall be added to the tax value of the property. It is also the duty of any person purchasing real estate prior to October 1 of any tax year and owning the same on that date to report such purchase to the tax assessor and assess the property with him between October 1 and prior to January 1 following the purchase. However, the failure of the tax assessor to assess property to the true owner does not invalidate any assessment made by him.

Under Section 3 thereof, the tax assessor shall, after October 1, 1949, and annually thereafter, credit any person entitled to a homestead exemption who has previously claimed such exemption with the same, without such person having to claim it annually; and any person who thereafter becomes entitled to a homestead exemption shall make a claim for the same to the tax assessor between October 1 and January 1 of any tax year, and, if the claim is allowed, he shall not be required to repeat it annually thereafter. A person who has just acquired property on which he is entitled to a homestead exemption must claim the same once before it can be allowed, notwithstanding the fact that the person from whom he bought it was also entitled to a homestead exemption thereon and

had previously claimed the same. Under Section 4 (a) of said act, if there is any change in the circumstances in regard to property on which a homestead exemption has been claimed and allowed that would cause it to be no longer entitled to the exemption, the person required to pay the tax thereon must notify the tax assessor between October 1 and January 1 that the property is no longer exempt, and the tax assessor shall list the same for taxation. Under Section 4 (b), any property which is not entitled to a homestead exemption as a matter of law and fact, but on which a homestead exemption has been illegally or improperly claimed and allowed, may be assessed for ad valorem taxes for State purposes by the tax assessor as an escape for a period not to exceed five years, and in addition to all other penalties, fees, charges, and interest allowed by law on escape property assessments, shall bear a penalty of fifteen percent per annum of the taxes due.

The provisions of Section 5 of said act, in regard to exemptions on personal property, are identical in legal effect with the provisions of Sections 3 and 4 (a) in regard to homestead exemptions.

In view of the above, it is my opinion that the specific questions propounded in your letter of inquiry should be answered as follows:

1. Any person required to report or return to the tax assessor changes in the ownership or physical status of real estate during the prior tax year must do so between October 1 and December 31 of the current tax year, the provisions of Title 51, Sections 37 and 49, Code of Alabama 1940, to the contrary notwithstanding.

2. If a person has once claimed and been allowed a homestead exemption and exemptions on personal property, and there is no change in the circumstances which would cause him to be no longer entitled to such exemptions, he should have the same credited to him by the tax assessor each year, without any subsequent action on his part. In such event, the provisions of Title 51, Section 52, Code of Alabama 1940, are without application.

Likewise, it is my opinion that the specific questions propounded in Mr. Summers' inquiry should be answered as follows:

1. See my answer to the second specific question in Mr. Touart's inquiry. Where a taxpayer's status is unchanged, Title 51, Section 52, Code of Alabama 1940, has no application; the taxpayer is under no duty to make any report or return; and no penalty accrues against him for failure so to do.

2. Yes. Title 51, Section 49, Code of Alabama 1940, has no application; the tax assessor is relieved from giving the notice required by said section; and the taxpayer is relieved of the fee for the same.

3. Yes.

4. Yes. If a taxpayer is required to make a report or return to the tax assessor because of a change in the physical status of his property during the prior tax year, he must do so between October 1 and December 31 of the current tax year or the ten per cent penalty for failure so to do accrues.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 17, 1949.

Hon. David E. Dunn, Chairman,
Board of Revenue,
Montgomery County,
Montgomery, Alabama.

Hon. John L. Goodwyn, Mayor,
City of Montgomery,
Montgomery County,
Montgomery, Alabama.

Elections on Constitutional Amendments.

Title 17, Section 114, Code of Alabama 1940.

There is no provision for a contest of an election upon the adoption of an amendment to the State Constitution and that part of Title 17, Section 114, Code of Alabama 1940, providing that the voting machines shall remain locked against voting for the time as provided by law, for the filing of contest has no application to an election at which the only matters voted on were the adoption or rejection of amendments to the State Constitution.

Opinion by the Attorney General.

Gentlemen:

Your request for an official opinion, bearing date of December 17, 1949, is as follows:

"On Tuesday, December 13, 1949, an election was held in Montgomery County, along with other counties of the State, on the rejection or adoption of nine amendments to the Constitution of Alabama. The voting machines procured by the City of Montgomery were used in said election in all precincts lying within the City of Montgomery as is done in all elections in Montgomery County. There are no surplus or additional machines available for us in the City of Montgomery or County of Montgomery. Title 17, Section 106 of the Code of Alabama 1940 requires certain voting machines to be

placed or displayed on public exhibition during the thirty days preceding an election. Title 17, Section 114 of said Code requires the voting machines to remain locked against voting for the time required by law for the filing of contests.

"An amendment to the Constitution of Alabama adopted in 1947 (See Pocket Supplement 1, of 1940 Code, pp. 59, 60) provides that the Board of Revenue of said County may call a county-wide election at which there shall be submitted to the vote of the qualified electors of the county a special tax for hospital or public health purposes in Montgomery County, as proposed by the said Board of Revenue. If such election is held after February 1, 1950, there may be a considerable delay in holding the election due to the other requirements of the law that will become applicable after February 1, 1950.

"Your opinion is therefore requested on the following question:

"Is there any provision of law for a contest of an election upon the rejection or adoption of an amendment to the state Constitution? If your answer is in the negative, does Title 17, Section 114 of said Code apply to the election held on December 13, 1949?"

In response to your request, the Constitution of Alabama contains within itself the mode by which amendments to the State Constitution may be proposed and adopted. (See Section 284 of the Constitution of 1901.) There is no provision in the Constitution nor in the statutes of the State for a contest on an election upon the adoption or rejection of a constitutional amendment. Consequently, there is no time provided by law for the filing of any such contest and in my opinion Title 17, Section 114 of the 1940 Code has no application to the election upon the constitutoinal amendments which took place on December 13, 1949.

Respectfully,
A. A. CARMICHAEL,
Attorney General of Alabama.

December 19, 1949.

Hon. John M. Gallalee,
President,
University of Alabama,
University, Alabama.

Counties—Alabama School of Dentistry—Scholarship Award.

1. Under the provisions of Act No. 207, General Acts 1945, page 323, the Dental Societies of the respective districts and the governing bodies of the several counties of the State may make an award of the scholarship provided for within Section 6 of such act for a period of more than one year at a time.

2. The award of any such scholarship, once duly and lawfully made by the county governing body, is binding upon the Board of Trustees of the University of Alabama.

3. The Board of Trustees of the University of Alabama and the authorities of the School of Dentistry are not controlled by the attempted revocation of any scholarship award once duly and lawfully made by the county governing body and the substitution of another therefor, such latter act being of no force and effect.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of October 3, 1949, is as follows:

"The Act creating the School of Dentistry, University of Alabama (General Acts of Alabama 1945, Pages 323-325), operated by the Board of Trustees of the University of Alabama, provides in Section 6 the machinery for establishing a scholarship for each county in the State of Alabama in the amount of Four Hundred Dollars ($400.00) per year for the benefit of one resident of each such county, payable from the annual appropriation to the School of Dentistry.

"There is attached hereto and marked Exhibit 'A' for identification a photostatic copy of a recommendation dated September 28, 1948, from the Fifth District Dental Society recommending that the annual scholarship to a citizen of St. Clair County to said School of Dentistry be awarded to Raymond F. Cox for the following sessions: 1948-49; 1949-50; 1950-51 and 1951-52. This recommendation is approved by the Board of Revenue of St. Clair County.

"Mr. Cox received the said scholarship as recommended and approved for the year 1948-49.

"There is attached hereto and marked Exhibit 'B' for identification a photostatic copy of a recommendation dated September 24, 1949, from the Board of Census of the Fifth District Dental Society of Alabama recommending that the annual scholarship awarded to a citizen of St. Clair County to the University of Alabama School of Dentistry be awarded to Bill J. Cobb for the session September 1949 to June 1950. This recommendation has been approved by the Court of County Commissioners of St. Clair County.

"There is also attached hereto a photostatic copy of a covering letter from the Court of County Commissioners of St. Clair County to the said Exhibit marked 'B' dated September 27, 1949, addressed to Mr. Oden, Business Manager Alabama School of Dentistry, Birmingham, Alabama. This is marked Exhibit 'C' for identification.

"The Board of Trustees of the University of Alabama respectfully asks for your opinion on the following points:—

"(1) Was the recommendation and approval as shown by Exhibit 'A' legal and binding upon the Board of Trustees of the University of Alabama?

"(2) Is it the duty of the Board of Trustees of the University of Alabama to be controlled by the withdrawal of the four-year award to Mr. Cox and recognize in lieu thereof the requested award to Mr. Cobb?

"(3) Will you please construe Section 6 of the Act creating the School of Dentistry, University of Alabama (General Acts of Alabama, Page 324), so as to clarify whether the scholarship to the School of Dentistry can thereunder be awarded for more than one year at a time?"

Inasmuch as your inquiry relates to Section 6, Act No. 207, General Acts 1945, page 323, I shall here set out in full the provisions of such section:

"The Board of Trustees of the University of Alabama is hereby authorized and required to establish a scholarship for each county in the State of Alabama in the amount of four hundred dollars ($400.00) per year for the benefit of one resident of each such county, payable from the annual appropriation to the School of Dentistry. To be eligible for this scholarship a person shall be a young man or woman of good character and shall have been accepted for matriculation by the authorities of the School of Dentistry in accordance with the current standards and requirements of said school, which standards and requirements in turn must in every way meet the requirements for an approved dental school as fixed by the Council of Dental Education of the American Dental Association. The beneficiaries of said scholarship in every instance shall be designated by a majority vote of the Board of Censory of the District Dental Society in which the county is located, and shall be subject to the approval of the board of revenue or court of county commissioners or other county governing body, however, designated, of the respective counties. It is further provided that applicants for admission to the freshman class of the dental school who are bona fide residents of the State of Alabama and who meet the admission requirements of the school, shall have preferential consideration by the Committee on admissions of the school."

By your request for opinion and exhibits attached thereto, I am informed that upon September 28, 1948, the Fifth District Dental Society designated one Raymond F. Cox as the recipient of the four hundred dollar annual scholarship provided for by Section 6, supra, for St. Clair County, Alabama, this recommendation being for the school sessions 1948-49, 1949-50, 1950-51 and 1951-52. This recommendation is in proper form, bearing the requisite signatures, and was upon this same date

approved by the county governing body of St. Clair County, and you advised that Mr. Cox received said scholarship as recommended and approved for the year 1948-49.

You further advise that upon September 24, 1949, this same Fifth District Dental Society recommended and designated that one Bill J. Cobb be awarded the St. Clair County scholarship for the school year 1949-50, which recommendation was upon September 27, 1949, approved by the governing body of St. Clair County and forwarded to the authorities of the Alabama School of Dentistry under covering letter stating that it was the desire of the Court of County Commissioners of St. Clair County to withdraw the award previously made to Mr. Cox and to substitute in lieu thereof the award to Mr. Cobb for the year 1949-50.

Your request for opinion presents three inquiries and in answering same, I shall consider your third inquiry first, and for answer thereto, I will state that, in my opinion, there is nothing to be found within Act No. 207, supra, preventing the award of the scholarship provided for by Section 6 of such act for more than one year at a time. The aforementioned Section 6 merely provides that such scholarship shall be in the amount of four hundred dollars per year and that same shall be paid from the annual appropriation to the School of Dentistry. This, in no sense, constitutes any limitatiton upon the power and authority of the dental societies of the respective districts or the governing bodies of the several counties to award such scholarship for more than one year, this being a question addressing itself exclusively to the district dental society and the county governing body making such award.

Addressing my attention next to your first inquiry, it is my opinion that the recommendation and approval as shown by Exhibit A, that is, the four-year award of such scholarship to Mr. Cox, is legal and binding upon the Board of Trustees of the University of Alabama, conditioned, of course, upon the recipient of such award meeting and maintaining the qualifications stated regarding eligibility for such award, as found within Section 6 of Act No. 207, supra. Referring once again to this same Section 6, it is to be noted that the Board of Trustees is "authorized and required" to establish such scholarship for each county and that the designation of a recipient thereof is vested solely in the District Dental Society and the county governing body of the county concerned. No discretion is granted the Board of Trustees in this regard and the award once lawfully made is binding upon the Board of Trustees and the authorities of the School of Dentistry.

Lastly, answering your inquiry No. 2, it is my opinion that the Board of Trustees of the University of Alabama is not to be controlled by the attempted withdrawal of the award to Mr. Cox and the substitution in lieu thereof of the award to Mr. Cobb. As heretofore indicated, Section 6 of Act No. 207, supra, provides that the Board of Trustees must establish a scholarship for each county in the State for the benefit of one resident thereof. Therefore, the governing body of each of the counties is authorized to make only one award, and this having been done, any sub-

sequent attempt to make a further award of such scholarship would be of no avail. In the instant case, the governing body of St. Clair County has already heretofore lawfully made an award of the scholarship established for its benefit for the year 1949-50, this to Mr. Cox, under date of September 28, 1948. This award being lawfully made and of binding effect upon the county and the authorities of the School of Dentistry, it is my opinion that no further award for this particular year could be made and any effort to do so is a nullity.

However, the governing body of St. Clair County has sought to circumvent this situation by making an attempted withdrawal of the award previously made to Mr. Cox and to substitute in lieu thereof an award to Mr. Cobb. This, in my judgment, they may not do.

Under the provisions of Section 6, Act No. 207, supra, it is not mandatory that the county governing body of each county designate a recipient of the scholarship award established. It is discretionary with such governing body as to whether or not it cares to award such scholarship. When the governing body of St. Clair County has exercised this discretionary power vested in it by the Legislature by the act in question, then the action of that body is of binding effect on the county, unless it be an abuse of such authority. When, therefore, the county governing body of St. Clair County, in the exercise of its vested authority by proper and lawful means, made an award of the scholarship in question and made such fact known to the authorities of the School of Dentistry, the discretion and power of such body under the act here in question ceased. The action of such body being of legal and binding effect, it then became incumbent upon the Board of Trustees to recognize and put into effect the scholarship so awarded.

The resulting conclusion, therefore, is that there was no authority which could compel the county governing body, or the District Dental Society, to make an award of the scholarship, but, however, when such agencies have exercised their discretion in this regard and have made an award of the scholarship, such act is binding upon them and may not be suspended or revoked by them. Although not directly analagous, the situation considered by the Supreme Court, in the case of **State ex rel Smith et al v. the Justice,** 200 Ala. 483, 76 So. 425, is decidedly similar to that here considered and the opinion of the Supreme Court therein supports in full the conclusion above expressed.

I, therefore, advise you that the scholarship provided for by Section 6, Act No. 207, supra, may be awarded by the county governing body for more than one year at a time and that any such award so made is binding upon the county governing body and the authorities of the University of Alabama, and that the Board of Trustees of such institution is not to be controlled by the attempted revocation of the scholarship award here in question and the substitution of another in lieu thereof.

Inasmuch as certain inquiries of like nature to those here considered have been addressed to me concerning the scholarship award provided for

by Act No. 89, General Acts 1943, p. 89, for students in attendance at the Medical College of Alabama, I deem it well to here state that the reasoning and conclusions herein expressed would be equally applicable to this latter scholarship award.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 21, 1949.

Hon. T. J. Klumpp, Sr.,
Mayor, Town of Fairhope,
Baldwin County,
Fairhope, Alabama.

Alabama Alcoholic Beverage Control Act.

1. Under Title 29, Section 1, Code of Alabama 1940, the Alabama Alcoholic Beverage Control Board is clothed with authority to determine the population of municipalities or incorporated cities and towns in such manner as it may prescribe.

2. The population within the police jurisdiction of a municipality or an incorporated city or town, but without the corporate limits thereof, cannot be included in arriving at the population of the municipality, city or town.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of October 22, 1949, is as follows:

"Heretofore Dale's Seafood House filed an application with the City of Fairhope for approval of a Restaurant License to sell liquor, at #409 Fairhope Ave., Fairhope, Alabama. This license was approved, subject of course, to the action of the Alabama Alcoholic Beverage Control Board.

"During the month of August, 1949, a census of the people living within the corporate limits of the City of Fairhope was taken and duly certified to the Secretary of State under the provisions of pertinent Alabama Statutes. This census showed that there are 3,367 people within the corporate limits of said City. Satisfactory proof has been made that there are upwards of 1,500 additional people living without the corporate limits of said City but within the police jurisdiction thereof.

"Sub-Section 'L' of Section 1 of Title 29, Code of Alabama defines municipality as follows:

" 'Municipality shall mean any incorporated city or town of this State and its police jurisdiction.'

"Sub-Section 'O' defines restaurant as follows:

" 'Restaurant shall mean a reputable place within a **MUNICIPALITY** of 4,500 population or more, or within the police jurisdiction thereof.'

"Request is hereby made that you render an opinion on the following question.

"Is the town of Fairhope, having a population within the Corporate Limits of 3,367, and in addition thereto a population of upward of 1,500 without the Corporate Limits but within police jurisdiction thereof, a **MUNICIPALITY** of 4,500 population or more within the meainng of sub-sections 'L' and 'O' of Section 1 Title 29 of the Code of Alabama, 1940, so as to authorize the town of Fairhope to issue a permit and the Alabama Alcoholic Beverage Control Board to issue a **Restaurant** Liquor License to the operator of a restaurant within the town otherwise qualifying under the Alabama Alcoholic Beverage Control Statutes?"

My answer is in the negative.

In Quarterly Report of Attorney General, Vol. 9, page 78, this office dealt with a similar proposition in relation to the issuance of a hotel liquor license. The opinion noted first calls attention to the fact that the statutes do not prescribe the use of any certain census in determining population under the Alabama Alcoholic Beverage Control Board Act. Therefore, this office held that the matter of population should be determined by the Alabama Alcoholic Beverage Control Board in a manner prescribed by, and satisfactory to, it. Thereupon, said opinion held, in pertinent part, as follows:

"Your second inquiry must be answered in the negative. That is, in determining the population of an incorporated city or town, the population within the police jurisdiction, but without the corporate limits thereof, cannot be included in the population of the city or town. As I read and understand the above quoted provision of subsection (c) of Section 2 of the Alabama Beverage Control Act, the clause 'or within the police jurisdiction thereof' **does not refer to the place, space or area in which the population referred to is located, but rather that it refers to the place, space or area within which a hotel may be located.**" (Emphasis supplied.)

Relative to the above, specific reference is made to the wording of Title 29, Section 1, Subsection (c), Code of Alabama 1940, in which it is stated that hotels shall mean "establishments **within incorporated cities or towns** of not less than four thousand five hundred nor more than twenty-five thousand population, **or within the police jurisdiction thereof.**" (Emphasis supplied.)

It is true that Title 29, Section 1, Subsection (o), Code of Alabama 1940, states that a restaurant shall mean a reputable place "within a municipality of four thousand five hundred population or more, or within the police jurisdiction thereof." (Emphasis supplied.)

Thus, the question is raised whether or not Section 1, Subsection (o), supra, must be construed with Section 1, Subsection (1), supra, in such a way as to give effect to the combined total population count within both the corporate limits and the limits of the police jurisdiction. This necessitates statutory construction to determine the true legislative intent of Subsections (1) and (o), supra. This can only be done by a study of the act as a whole.

"* * * There can be no fair or just construction or interpretation, if it be limited to particular words or phrases, or the words or phrases of particular clauses. The whole must be considered, to ascertain the sense and significance in which words or phrases are used in particular parts or clauses. Cooley, Const. Lim. p. 74"—**State ex rel. Winter v.** Sayre, 118 Ala. 1, 24 So. 89.

I adhere to the conclusion of the opinion reported in Quarterly Report of Attorney General, Vol. 9, page 78, supra, i. e., that the legislature, in using the words "or within the police jurisdiction thereof," did not intend to refer to the place, space or area in which the population is located, but rather to the place, space or area in which the hotel is located.

While I realize that Subsection (1), supra, defines a municipality as an incorporated city or town and its police jurisdiction, I do not think that the use of the word "municipality," perhaps inadvertently or inappropriately, in Subsection (o), supra, should presumptively upset the apparent legislative intent of the act or law, considered in its entirety. I am convinced that the essence of legislative intent embodied in both Subsections (c) and (o), supra, is directed to the fixing of a situs of an establishment or place for which a liquor license is desired, rather than the fixing of a basis for determining the population of an approved area. This conclusion is borne out by a careful reading of Subsection (o) in full, same being in pertinent part as follows:

> "(o) 'Restaurant' shall mean a reputable place within a municipality of four thousand five hundred population or more, **or within the police jurisdiction thereof,** operated by a responsible person of good reputation, * * *" (Emphasis supplied.)

To place a contrary construction on Subsection (o), supra, would render meaningless and mere surplusage the phraseology employed, to-wit, "or within the police jurisdiction thereof." I am, therefore, of the opinion that the intended meaning of Section 1, Subsection (o), supra, is that a restaurant for which a liquor permit may be issued is a reputable place located within a municipality having a population of four thousand

five hundred or more, or is a reputable place located within the police jurisdiction of such a municipality.

Consequently, I am constrained to hold that the town of Fairhope, with an existing population of only 3,367 within its corporate limits, is without authority to issue the restaurant liquor license herein discussed, and you are so advised.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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